

RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

- AAM -the abbreviation to identify the adopting agency
- 01 -the *State Register* issue number
- 96 -the year
- 00001 -the Department of State number, assigned upon receipt of notice
- E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing; or C for first Continuation.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

Department of Agriculture and Markets

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Sanitation and Processing Procedures for Slaughterhouses

I.D. No. AAM-20-06-00017-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Part 245 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16(1), 18(6) and 96-a

Subject: Sanitation and processing procedures for slaughterhouses licensed pursuant to article 5-A of the Agriculture and Markets Law.

Purpose: To improve the sanitary conditions and processing procedures of slaughterhouses in order to help ensure the wholesomeness of meat and poultry produced therein.

Public hearing(s) will be held at: 11:00 a.m., July 5, 2006 at Department of Agriculture and Markets, 55 Hanson Place, Third Fl., Brooklyn, NY; and 11:00 a.m., July 7, 2006 at Utica State Office Building, Conference Rm. A, 1st Fl., 207 Genesee St., Utica, NY.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Text of proposed rule: Subdivision (a) of section 245.1 is amended and a new subdivision (b) is added to read as follows:

(a) Prior to the issuance of a slaughterhouse license pursuant to article 5-A, the commissioner must be satisfied that [the requirements as to construction and sanitation established by this Part are complied with and to that end] *the slaughterhouse complies with construction, equipment and sanitation requirements established by this Part. To determine whether the slaughterhouse is in compliance with these requirements, the commissioner may cause an examination of the premises, equipment and facilities to be made. Complete drawing and specifications for new construction, new businesses and [major] alterations of existing premises shall be submitted to the commissioner for approval [before such construction is begun. As many existing licensed premises do not presently conform to the requirements hereof, the commissioner may waive strict compliance with this Part by such presently licensed plants provided the cleanliness of the premises and the wholesomeness of the products produced are not adversely affected]. Construction of new facilities, new businesses and alterations of existing facilities shall not commence until the drawings and specifications have been reviewed and approved by the commissioner.*

(b) *Licensees shall conduct only the slaughter operations that are listed on their license application and have been approved by the commissioner.*

Subdivisions (b), (f), (g), (h), (j), (k), (m) and (n) of section 245.2 are re-lettered subdivisions (c), (g), (h), (i), (l), (m), (o) and (q); subdivisions (c), (d), (e), (i) and (l) are re-lettered subdivisions (d), (e), (f), (j) and (n) and amended; and new subdivisions (b), (k) and (p) are added to read as follows:

(b) *The outside premises shall be maintained in a condition that prevents it from becoming an attractant, breeding place or harborage for rodents, insects and other pests. Garbage, refuse, debris and waste materials shall be stored as to minimize the development of odor and to prevent it from becoming an attractant and harborage or breeding place for rodents, insects and other pests. Roadways on the premises adjacent to the establishment shall have a hard surface.*

[(c)](d) There shall be abundant light, both natural and artificial, of good quality and well distributed, and sufficient ventilation for all rooms and compartments to [insure] *ensure* sanitary conditions.

[(d)](e) There shall be an efficient drainage and plumbing system for the establishment and premises. All drains and gutters shall be properly installed with approved traps and vents in accordance with [the State Building Construction Code, 9 NYCRR 856.4 and] any *State or* local construction or sanitary code, and shall be connected to a sanitary sewer or acceptable disposal system. The discharge of water and waste must conform to [the requirements of article 12 of the Public Health Law] *all State or local requirements.*

[(e)](f) (1) An adequate potable water supply, both hot and cold, delivered under pressure to sufficient, convenient outlets for washing carcasses and parts, walls, floors and equipment shall be available at all times during operation.

(2) An ample supply of water at not less than 180°F *and/or an approved sanitizer* shall be furnished and used for the cleaning of equipment, floors, walls and the like which are subject to contamination in the dressing or handling of diseased [carcasses] *carcasses*, their viscera and parts.

(5) A knife sterilization or disinfection system shall be provided for the evisceration of animals and fowl.

[(i)](j) Construction shall render the establishment resistant to the entrance of rodents, [flies] insects and other vermin. The use of poisons for any purpose in rooms or compartments where any unpacked product is stored or handled is forbidden, except under such restrictions and precautions as the commissioner may prescribe. [So-called rat viruses shall not be used in any part of an establishment or the premises thereof.]

(k) The establishment shall be maintained in a condition that prevents the attraction of rodents, insects and other vermin.

[(l)](n) All slaughtering and processing rooms shall have sufficient conveniently located handwashing facilities of foot-pedal operation or equivalent devices and supplied with hot running water with a temperature of at least 105°F and cold running water tempered by means of a mixing valve or combination faucet, powdered or liquid soap dispensed from a sanitary container and individual towels or hand drying devices.

(p) The live animal and poultry holding areas shall be separated from the killing, processing and storage areas of the establishment by the use of separate rooms.

Subdivisions (d) and (e) of section 245.3 are re-lettered subdivisions (e) and (f) and new subdivisions (d) and (g) are added to read as follows:

(d) Hand-washing facilities shall be provided with hot water of at least 105°F and cold water tempered by means of a mixing valve or combination faucet, powdered or liquid soap dispensed from sanitary containers and individual towels or hand drying devices.

(g) A separate room shall be provided for the cleaning and sanitizing of transportation cages. Cleaning and/or storing transportation cages outside of the establishment is prohibited.

Subdivisions (b) and (c) of section 245.4 are re-lettered subdivisions (c) and (d) and amended and a new subdivision (b) is added to read as follows:

(b) Live animal and poultry holding and transportation cages shall be thoroughly cleaned and sanitized after use, with the exception of transportation cages that have been placed on a vehicle for return immediately after the delivery of the live animals and poultry. Live animals and poultry shall not be housed in transportation cages, but shall be housed in holding cages equipped with waste material catch pans at the bottom of each cage. Such cages shall provide access to food and water. Live animals and poultry shall be obtained only from approved sources and shall meet all animal health requirements as set forth in Parts 45, 57, 62, 63 and 67 of 1 NYCRR.

[(b)](c) Tools, equipment and utensils used for preparing, processing and otherwise handling any product shall be of such material and construction as will make them susceptible of being readily and thoroughly cleaned and such as will [insure] ensure strict cleanliness in the preparation and handling of all products. So far as is practicable, such equipment shall be made of metal or other impervious material. Trucks and receptacles used for inedible material shall be of similar construction and shall bear some conspicuous and distinctive mark, and shall not be used for handling edible products.

[(c)](d) Tools, equipment and utensils shall be made of nontoxic material, shall be thoroughly cleaned and sanitized immediately after a change in processing between species, after any interruption of operations during which contamination may have occurred, and after each day's use. The equipment shall be properly stored and protected when not in use and shall be clean at the time of use. All shroud cloths shall be acceptably clean at time of use.

Subdivisions (b), (c) and (e) of section 245.5 are amended; subdivisions (f), (g), (h) and (i) are re-lettered subdivisions (i), (j), (k) and (l); subdivision (j) is re-lettered subdivision (m) and amended; and new subdivisions (f), (g), (h) and (n) are added to read as follows:

(b) Refrigerated storage of adequate capacity shall be provided and maintained at temperatures not to exceed [40°F] 41°F for fresh meats and poultry, carcasses and parts thereof, and not to exceed [50°F] 41°F for processed meats and poultry, meat and poultry by-products and meat and poultry food products.

(c) Vehicles in which products are transported shall be so constructed as to prevent dust, dirt, flies, insects and other contamination from coming in contact with products and shall be maintained in a clean and sanitary manner. Refrigeration at a temperature not to exceed 41°F and satisfactory protective covering for products shall be provided when necessary.

(e) In establishments where poultry is processed, chilling tanks or vats shall be of smooth metal construction. They shall have a continuous water overflow and be emptied, cleaned and sanitized after each use [and thoroughly cleaned and sanitized]. Poultry carcasses and parts thereof not

given to the consumer immediately upon completion of processing shall be chilled. An internal temperature of 41°F or lower must be achieved within five hours. Once chilled, poultry products shall be held at an internal temperature not to exceed 41°F. Ice used in such tanks and vats shall be clean and wholesome and stored in a clean, sanitary manner.

(f) All poultry carcasses and parts thereof, shall be thoroughly rinsed following evisceration.

(g) Poultry scalders shall maintain a continuous intake of potable water sufficient to maintain clean water and provide a minimum overflow of one quart of water per bird per minute. They shall be emptied, cleaned and sanitized after each use.

(h) Eviscerating facilities and equipment at each work station shall be sufficient to ensure that carcass and product preparation can be accomplished without contamination.

[(j)](m) A separate inedible waste room shall be provided for handling and storage of waste containers and covers, waste materials, inedible material, and condemned products. This room shall be so located as to [insure] ensure no contamination to edible products or congestion in the establishment. Hot and cold running water, proper drainage, and facilities for cleaning the area shall be provided and the area shall be maintained in a clean and sanitary condition. Where necessary it shall be separated from any area in which edible products are handled.

(n) Establishments desiring to singe poultry must meet the following requirements:

(1) The singeing process may only be used to remove excess feathers and shall not be used to brown or burn the flesh. Singeing shall be conducted after removal of feathers.

(2) Singed carcasses shall be chilled and eviscerated immediately after singeing.

(3) Finished product shall be labeled with the following statement: "Keep refrigerated at 41°F or below. Poultry must be cooked to an internal temperature of 165°F or higher."

Subdivisions (b) and (d) of section 245.6 are amended to read as follows:

(b) Rooms and compartments in which animals are slaughtered or any product is processed or prepared shall be kept reasonably free of steam and vapors to enable proper inspections and to [insure] ensure clean operations. The walls, ceilings and overhead structures of rooms and compartments in which products are prepared, handled or stored shall be kept reasonably free of moisture.

(d) Aprons, frocks, and other outer clothing worn by persons who handle any product shall be of material that is readily cleaned and only clean garments shall be worn. Clean garments must be worn at the start of each working day and garments must be changed during the day as often as necessary to prevent adulteration of product and creation of insanitary conditions. Care shall be taken to prevent the contamination of products with perspiration, hair, cosmetics, medicaments and the like.

Sections 245.8 and 245.9 are repealed, and a new section 245.8 is added to read as follows:

§ 245.8 Exotic animals.

(a) For purposes of this section, exotic animal shall mean any captive reindeer, elk, deer, antelope, water buffalo or bison which are raised commercially for food.

(b) Field slaughter of exotic animals shall be permitted, provided that the following requirements are met:

(1) The farm or animal owner has a designated area where an ante-mortem inspection and slaughter can be performed;

(2) A veterinarian shall conduct an ante-mortem inspection on the same day of slaughter.

(3) A copy of the veterinarian's ante-mortem report shall accompany the transport vehicle to the processing facility.

(4) The processing facility shall retain and maintain a copy of the ante-mortem report for a period of one year from the date of receipt of the slaughtered exotic animal.

(5) The transport of intact, exotic animal carcasses to a processing facility shall take place on the day of slaughter.

(6) The slaughter of all species susceptible to chronic wasting disease shall be performed in accordance with Part 68 of 1 NYCRR.

(c) Packaged or encased exotic meats sold at wholesale within New York State shall bear the following statement on the product label or carton: Processed at a NYSDAM Article 5-A Facility.

Text of proposed rule and any required statements and analyses may be obtained from: J. Joseph Corby, Director, Division of Food Safety and Inspection, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-4492

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: five days after the last scheduled public hearing.

Regulatory Impact Statement

1. Statutory authority:

Section 16(1) of the Agriculture and Markets Law (Law) provides, in part, that the Commissioner shall have the power to execute and carry into effect the laws of the State and the rules of the Department, relative to the production, transportation, storage, marketing and distributing of food.

Section 18(6) of the Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department.

Section 96-a of the Law provides, in part, that the supervision of the slaughtering of animals and fowl for food is in the public interest and that Article 5-A of the Law is enacted to protect the public health.

2. Legislative objectives:

The proposed amendments accord with the public policy objectives the Legislature sought to advance by enacting the statutory authority. By improving the sanitary conditions and processing procedures for slaughterhouses licensed pursuant to Article 5-A of the Law, the proposed amendments will help ensure the wholesomeness of the meat and poultry produced by these establishments, thereby protecting the public health.

3. Needs and benefits:

There are 127 slaughterhouses licensed pursuant to Article 5-A of the Law. These establishments slaughter and process a wide array of species, including poultry, buffalo, domesticated deer, rabbit, emu and ostrich.

Poultry is particularly popular among consumers, who believe that the birds sold by slaughterhouses are fresher and healthier than those sold by supermarkets. It is estimated that these establishments slaughter, process and sell 250,000 to 300,000 birds per week. Consumers who shop at these establishments select their birds from the available stock. The establishments then slaughter and process the poultry to the consumers' specifications while the consumers wait.

The poultry slaughtered and processed in these establishments are known carriers of bacteria that can cause illness in humans. These include salmonella, campylobacter and e-coli. However, proper slaughtering, processing, refrigeration, cooking and sanitizing procedures would help to ensure that bacteria is not a threat to those who purchase and consume products from these establishments.

The proposed amendments would improve sanitation and processing procedures by adding the following requirements: submission to the Commissioner for approval of drawings and specifications for construction of new facilities, new businesses and alterations of existing facilities (section 245.1(a)); maintenance of the outside premises in a sanitary manner (section 245.2(b)); allowance for the use of approved sanitizers in conjunction with, or in lieu of, hot water (section 245.2(f)(2)); implementation and use of a system to sterilize knives used in the evisceration of animals and fowl (section 245.2(f)(5)); maintenance of the premises in a condition that prevents the attraction of rodents, insects and other vermin (section 245.2(k)); tempered water at a temperature of 105°F for handwashing facilities (sections 245.2(n) and 245.3(d)); separate rooms for the holding of live animals and poultry and the killing and storage of processed animals and poultry (section 245.2(p)); separate rooms for washing and sanitizing holding and transportation cages; (section 245.3(g)); cleaning and sanitizing of holding and transportation cages following each use (section 245.4(b)); requirement that live animals and poultry be obtained only from approved sources and shall meet all animal health requirements as set forth in Parts 45, 57, 62, 63 and 67 of 1 NYCRR (section 245.4(b)); implementation and use of a system to clean and sterilize tools, equipment and utensils after a change of processing between species, after any interruption of operations and after each day's use (section 245.4(d)); refrigeration of processed products at a temperature of 41°F (sections 245.5(b), 245.5(c) and 245.5(e)); continuous water overflow for chilling tanks used in the processing of poultry as well as cleaning and sanitizing of tanks after each use (section 245.5(e)); requirement that poultry carcasses and parts thereof not given to the consumer immediately upon completion of processing shall be chilled and held at an internal temperature not to exceed 41°F (section 245.5(e)); thorough rinsing of poultry carcasses and parts thereof following evisceration (section 245.5(f)); continuous intake of potable water for poultry scalders as well as cleaning and sanitizing of scalders after each use (section 245.5(g)); proper eviscerating facilities and equipment at each work station (section 245.5(h)); and use of clean outer garments by employees when working in the eviscerating, cutting, and packaging operation (section 245.6(d)).

There are also new requirements for the singeing of poultry (section 245.5(n)) and the slaughter of exotic animals (section 245.8), which include reindeer, elk, deer, antelope, water buffalo and bison.

These requirements will help reduce and/or eliminate the number of pathogens found on meat and poultry, thereby reducing and/or eliminating the incident of food-borne illness in humans.

4. Costs:

(a) Costs to regulated parties:

It is anticipated that there will be no costs to regulated parties for the implementation of and continuing compliance with the proposed amendments to section 245.1(a) [drawings and specifications]; section 245.2(b) [outside premises]; section 245.2(f)(2) [sanitizers]; sections 245.2(n) and 245.3(d) [temperature of water for hand washing]; section 245.5(e) [chilling tanks and chilling of poultry not immediately given to the consumer following processing]; section 245.5(f) [thorough rinsing of poultry carcasses and parts thereof following evisceration]; section 245.5(g) [scalders]; section 245.5(h) [eviscerating facilities]; and section 245.6(d) [outer garments].

Regarding knife sterilization (section 245.2(f)(5)) and the cleaning and sterilization of tools, equipment and utensils after a change of processing between species, after any interruption of operations and after each day's use (section 245.4(d)), it is anticipated that regulated parties would incur initial costs of \$60.00 for the purchase of cleaning buckets and sanitizing solution. It is anticipated that regulated parties would incur annual costs of \$550.00, which includes labor costs and the purchase of sanitizing solution as needed.

Regarding the maintenance of the premises in a condition that prevents the attraction of rodents, insects and other vermin (section 245.2(k)), it is anticipated that regulated parties will incur \$70.00 per week in labor costs. This is predicated upon one employee earning \$10.00 per hour, dedicating one hour per day, seven days a week, on maintenance of the premises. It is anticipated that regulated parties would also have to retain the services of a professional exterminator two times a month to maintain rodent, insect and vermin control. Since exterminators charge \$25.00 per visit, regulated parties will incur costs of \$50.00 per month for exterminator services.

Regarding separate rooms for the holding of live poultry and the killing and storage of processed animals and poultry (section 245.2(o)), most establishments are already complying with this requirement. For those that are not, the cost will range from placement of a door between rooms at a cost of approximately \$100.00 to construction of a new room by building floor-to-ceiling walls at a cost of approximately \$40.00 per linear foot.

Regarding separate rooms for cleaning and sanitizing holding and transportation cages (section 245.3(g)), those establishments that do not have such facilities will have to construct them at a cost of approximately \$40.00 per linear foot.

Regarding the cleaning and sanitizing of holding and transportation cages (section 245.4(b)), it is estimated that regulated parties will incur costs of \$18.00 per day in order to comply with this requirement. This cost is predicated upon one employee working one and one half hours per day in cleaning and sanitizing approximately 30 holding and transportation crates. This cost includes labor, equipment, sanitizers and energy expenditure.

Regarding the refrigeration of processed products at a temperature of 41°F (section 245.5(b)), it is anticipated that regulated parties who do not have refrigeration facilities capable of maintaining food at 41°F or less will incur costs of replacing those units. Those costs will range from \$1,800.00 for a reach-in cooler to \$5,000.00 for a larger, walk-in box. However, since refrigeration units manufactured since 1993 are capable of maintaining food at 41°F or less, it is anticipated that the majority of units in use today are already capable of meeting this requirement.

Regarding the singeing of poultry (section 245.5(n)), it is anticipated that regulated parties who wish to singe poultry will have to purchase a propane tank, hoses, flame expeller and holding grates at an initial cost of \$225.00. It is anticipated that these regulated parties will incur annual costs of \$100.00 for the purchase of propane gas.

Regarding the slaughter of exotic animals, regulated parties who slaughter exotic animals in the field will have to have a veterinarian conduct an ante-mortem inspection on the day of slaughter. It is anticipated that on site ante-mortem inspections will cost regulated parties \$75.00 for the first animal and \$8.00 for each additional animal slaughtered. The total costs to regulated parties will vary, depending upon the frequency of field slaughter and the number of animals killed during each slaughter.

(b) Costs to the agency, state and local governments: None.

(c) Source:

Construction, equipment, product, labor and professional costs are based upon the Department's consultation with regulated parties as well as observations of business practices in the industry.

5. Local government mandates:

The proposed amendments would not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

Regulated parties who seek to open a new business as well as those who seek to undertake new construction in an existing business will have to submit floor plans to the Commissioner for approval.

Regulated parties who wish to singe poultry will be required to obtain certification from their local fire department for the use and storage of gas-filled equipment on their premises.

7. Duplication:

Part 45 of 1 NYCRR, entitled "Avian Influenza", contains sanitation and recordkeeping requirements for live poultry markets, poultry dealers and poultry transporters. The proposed amendments contain not only sanitation requirements, but also requirements concerning equipment and processing practices. Furthermore, the proposed amendments are not limited to live poultry markets but apply to all slaughterhouses licensed pursuant to Article 5-A of the Law. The proposed amendments do not conflict with Part 45 of 1 NYCRR.

Part 68, entitled "Captive Cervid Health Requirements," contains requirements to help detect and eradicate chronic wasting disease within the captive cervid population of New York State. The proposed amendments do not conflict with Part 68, since under the proposal, the slaughter of species susceptible to chronic wasting disease shall be performed in accordance with the requirements of Part 68 of 1 NYCRR.

8. Alternatives:

The only alternative considered was to not amend the regulations. This alternative was rejected due to the fact that the present regulations do not adequately safeguard the consuming public from food-borne illnesses caused by products which have been contaminated by inadequate sanitation and/or improper processing practices at slaughterhouses. The regulations were designed to safeguard public health while minimizing the burden on regulated parties.

9. Federal standards:

Part 352 of Title 9 of the Code of Federal Regulations (CFR) sets forth a voluntary inspection and certification program for wholesomeness relating to the slaughter and processing of exotic animals. The proposed amendments do not preclude regulated parties from participating in this voluntary, federal program.

10. Compliance schedule:

Immediate.

Regulatory Flexibility Analysis

1. Effect of rule:

There are 127 establishments licensed pursuant to Article 5-A of the Agriculture and Markets Law (Law) that would be affected by the proposed amendments. Most of these establishments are small businesses.

The proposed amendments would have no impact upon local governments.

2. Compliance requirements:

Regulated parties who seek to open a new business as well as those who seek to undertake new construction in an existing business will have to submit drawings and specifications to the Commissioner for approval.

Regulated parties who wish to singe poultry will be required to obtain certification from their local fire department for the use and storage of gas-filled equipment on their premises.

The proposed amendments would have no impact upon local governments.

3. Professional services:

An architect may be required to prepare drawings and specifications for submission to the Commissioner. Construction contractors may be required in order to build the separate rooms for killing and processing animals as well as for cleaning and sanitizing cages. Professional exterminators may be required in order to maintain rodent, insect and vermin control. For those regulated parties who engage in the field slaughter of exotic animals, veterinarians will be required to perform ante-mortem inspections of the animals on the day of slaughter.

The proposed amendments would have no impact on local governments.

4. Compliance costs:

It is anticipated that there will be no costs to regulated parties for the implementation of and continuing compliance with the proposed amend-

ments to section 245.1(a) [drawings and specifications]; section 245.2(b) [outside premises]; section 245.2(f)(2) [sanitizers]; sections 245.2(n) and 245.3(d) [temperature of water for hand washing]; section 245.5(e) [chilling tanks and chilling of poultry not immediately given to the consumer following processing]; section 245.5(f) [thorough rinsing of poultry carcasses and parts thereof following evisceration]; section 245.5(g) [scalding]; section 245.5(h) [eviscerating facilities]; and section 245.6(d) [outer garments].

Regarding knife sterilization (section 245.2(f)(5)) and the cleaning and sterilization of tools, equipment and utensils after a change of processing between species, after any interruption of operations and after each day's use (section 245.4(d)), it is anticipated that regulated parties would incur initial costs of \$60.00 for the purchase of cleaning buckets and sanitizing solution. It is anticipated that regulated parties would incur annual costs of \$550.00, which includes labor costs and the purchase of sanitizing solution as needed.

Regarding the maintenance of the premises in a condition that prevents the attraction of rodents, insects and other vermin (section 245.2(k)), it is anticipated that regulated parties will incur \$70.00 per week in labor costs. This is predicated upon one employee earning \$10.00 per hour, dedicating one hour per day, seven days a week, on maintenance of the premises. It is anticipated that regulated parties would also have to retain the services of a professional exterminator two times a month to maintain rodent, insect and vermin control. Since exterminators charge \$25.00 per visit, regulated parties will incur costs of \$50.00 per month for exterminator services.

Regarding separate rooms for the holding of live poultry and the killing and storage of processed animals and poultry (section 245.2(o)), most establishments are already complying with this requirement. For those that are not, the cost will range from placement of a door between rooms at a cost of approximately \$100.00 to construction of a new room by building floor-to-ceiling walls at a cost of approximately \$40.00 per linear foot.

Regarding separate rooms for cleaning and sanitizing holding and transportation cages (section 245.3(g)), those establishments that do not have such facilities will have to construct them at a cost of approximately \$40.00 per linear foot.

Regarding the cleaning and sanitizing of holding and transportation cages (section 245.4(b)), it is estimated that regulated parties will incur costs of \$18.00 per day in order to comply with this requirement. This cost is predicated upon one employee working one and one half hours per day in cleaning and sanitizing approximately 30 holding and transportation crates. This cost includes labor, equipment, sanitizers and energy expenditure.

Regarding the refrigeration of processed products at a temperature of 41°F (section 245.5(b)), it is anticipated that regulated parties who do not have refrigeration facilities capable of maintaining food at 41°F or less will incur costs of replacing those units. Those costs will range from \$1,800.00 for a reach-in cooler to \$5,000.00 for a larger, walk-in box. However, since refrigeration units manufactured since 1993 are capable of maintaining food at 41°F or less, it is anticipated that the majority of units in use today are already capable of meeting this requirement.

Regarding the singeing of poultry (section 245.5(n)), it is anticipated that regulated parties who wish to singe poultry will have to purchase a propane tank, hoses, flame expeller and holding grates at an initial cost of \$225.00. It is anticipated that these regulated parties will incur annual costs of \$100.00 for the purchase of propane gas.

Regarding the slaughter of exotic animals, regulated parties who slaughter exotic animals in the field will have to have a veterinarian conduct an ante-mortem inspection on the day of slaughter. It is anticipated that on site ante-mortem inspections will cost regulated parties \$75.00 for the first animal and \$8.00 for each additional animal slaughtered. The total costs to regulated parties will vary, depending upon the frequency of field slaughter and the number of animals killed during each slaughter.

The proposed amendments would have no impact on local governments.

5. Economic and technological feasibility:

The economic and technological feasibility of complying with the proposed amendments has been addressed.

The proposed amendments are economically feasible, since the present regulations require regulated parties to operate in a clean and sanitary manner. The proposed amendments are also technologically feasible, since the equipment, products and practices necessary to implement the proposed amendments are readily available to regulated parties.

The proposed amendments would have no impact upon local governments.

6. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-b(1), the proposed amendments were drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses. The proposed amendments would improve sanitary conditions and processing procedures by requiring regulated parties to improve and better utilize the sanitation and processing practices which they already have in place in order to comply with the present regulations.

The proposed amendments would have no impact upon local governments.

7. Small business and local government participation:

On November 3, 2004, copies of the proposed amendments were mailed to the 127 establishments licensed pursuant to Article 5-A of the Law, along with a cover letter requesting comments and/or input on the proposed amendments.

The proposed amendments would have no impact upon local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

There are 127 establishments licensed pursuant to Article 5-A of the Agriculture and Markets Law (Law) that would be affected by the proposed amendments. 84 of these establishments are located in the New York City / metropolitan area. The remaining 43 located in rural areas of New York.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

Regulated parties who seek to open a new business as well as those who seek to undertake new construction in an existing business will have to submit drawings and specifications to the Commissioner for approval. An architect may be required to draft those floor plans.

Construction contractors may be required in order to build the separate rooms for killing and processing animals as well as for cleaning and sanitizing cages.

Regulated parties who wish to singe poultry will be required to obtain certification from their local fire department for the use and storage of gas-filled equipment on their premises.

Professional exterminators may be required in order to maintain rodent, insect and vermin control.

For those regulated parties who engage in the field slaughter of exotic animals, veterinarians will be required to perform ante-mortem inspections of the animals on the day of slaughter.

3. Costs:

It is anticipated that there will be no costs to regulated parties for the implementation of and continuing compliance with the proposed amendments to section 245.1(a) [drawings and specifications]; section 245.2(b) [outside premises]; section 245.2(f)(2) [sanitizers]; sections 245.2(n) and 245.3(d) [temperature of water for hand washing]; section 245.5(e) [chilling tanks and chilling of poultry not immediately given to the consumer following processing]; section 245.5(f) [thorough rinsing of poultry carcasses and parts thereof following evisceration]; section 245.5(g) [scalding]; section 245.5(h) [eviscerating facilities]; and section 245.6(d) [outer garments].

Regarding knife sterilization (section 245.2(f)(5)) and the cleaning and sterilization of tools, equipment and utensils after a change of processing between species, after any interruption of operations and after each day's use (section 245.4(d)), it is anticipated that regulated parties would incur initial costs of \$60.00 for the purchase of cleaning buckets and sanitizing solution. It is anticipated that regulated parties would incur annual costs of \$550.00, which includes labor costs and the purchase of sanitizing solution as needed.

Regarding the maintenance of the premises in a condition that prevents the attraction of rodents, insects and other vermin (section 245.2(k)), it is anticipated that regulated parties will incur \$70.00 per week in labor costs. This is predicated upon one employee earning \$10.00 per hour, dedicating one hour per day, seven days a week, on maintenance of the premises. It is anticipated that regulated parties would also have to retain the services of a professional exterminator two times a month to maintain rodent, insect and vermin control. Since exterminators charge \$25.00 per visit, regulated parties will incur costs of \$50.00 per month for exterminator services.

Regarding separate rooms for the holding of live poultry and the killing and storage of processed animals and poultry (section 245.2(o)), most establishments are already complying with this requirement. For those that are not, the cost will range from placement of a door between rooms at a cost of approximately \$100.00 to construction of a new room by building floor-to-ceiling walls at a cost of approximately \$40.00 per linear foot.

Regarding separate rooms for cleaning and sanitizing holding and transportation cages (section 245.3(g)), those establishments that do not have such facilities will have to construct them at a cost of approximately \$40.00 per linear foot.

Regarding the cleaning and sanitizing of holding and transportation cages (section 245.4(b)), it is estimated that regulated parties will incur costs of \$18.00 per day in order to comply with this requirement. This cost is predicated upon one employee working one and one half hours per day in cleaning and sanitizing approximately 30 holding and transportation crates. This cost includes labor, equipment, sanitizers and energy expenditure.

Regarding the refrigeration of processed products at a temperature of 41°F (section 245.5(b)), it is anticipated that regulated parties who do not have refrigeration facilities capable of maintaining food at 41°F or less will incur costs of replacing those units. Those costs will range from \$1,800.00 for a reach-in cooler to \$5,000.00 for a larger, walk-in box. However, since refrigeration units manufactured since 1993 are capable of maintaining food at 41°F or less, it is anticipated that the majority of units in use today are already capable of meeting this requirement.

Regarding the singeing of poultry (section 245.5(n)), it is anticipated that regulated parties who wish to singe poultry will have to purchase a propane tank, hoses, flame expeller and holding grates at an initial cost of \$225.00. It is anticipated that these regulated parties will incur annual costs of \$100.00 for the purchase of propane gas.

Regarding the slaughter of exotic animals, regulated parties who slaughter exotic animals in the field will have to have a veterinarian conduct an ante-mortem inspection on the day of slaughter. It is anticipated that on site ante-mortem inspections will cost regulated parties \$75.00 for the first animal and \$8.00 for each additional animal slaughtered. The total costs to regulated parties will vary, depending upon the frequency of field slaughter and the number of animals killed during each slaughter.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the proposed amendments were drafted to minimize reporting and testing requirements for all regulated parties, including those in rural areas.

5. Rural area participation:

On November 3, 2004, copies of the proposed amendments were mailed to the 127 establishments licensed pursuant to Article 5-A of the Law, along with a cover letter requesting comments and/or input on the proposed amendments. 43 of these establishments are located in rural areas of New York.

Job Impact Statement

The proposed amendments would improve the sanitary conditions and processing procedures of slaughterhouses in order to help ensure the wholesomeness of meat and poultry produced by these establishments.

The proposed amendments would have no impact on jobs and employment opportunities in New York State.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Procedures for Evaluating Petroleum Products

I.D. No. AAM-20-06-00009-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: This is a consensus rule making to amend sections 224.2, 224.3(b), 224.5(g) and 224.10(c) of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18 and 179

Subject: Procedures for evaluating petroleum products; standards for cetane rating of and "maximum cloud point" of diesel fuel.

Purpose: To incorporate by reference Book 5 of the 2006 edition of the Annual Book of ASTM Standards ("annual book"); incorporate by reference the 2005 version of specification D 975 in the annual book; and delete the requirement that distributors and refiners of diesel fuel must certify the "maximum cloud point" of such fuel.

Text of proposed rule: Section 224.2 of 1 NYCRR is amended to read as follows:

224.2 Specifications and test procedures. Except as otherwise provided in this Part, the specifications and test procedures referred to in this Part shall be those set forth in the Annual Book of ASTM Standards, section 5, [2004] 2006 edition as published by the American Society for Testing and Materials (ASTM). This document is available from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428-

2959. It is available for public inspection and copying in the [Counsel's Office] *Office of the Director of Weights and Measures*, Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235 and in the office of the Department of State, 41 State Street, Albany, NY 12231.

Subdivision (b) of section 224.3 of 1 NYCRR is amended to read as follows:

(b) Diesel fuel. All diesel fuel shall meet the requirements in the Annual Book of ASTM Standards, specification number [D 975 (as in effect on January 1, 1992)] *D 975-05*.

Subdivision (c) of section 224.10 of 1 NYCRR is amended to read as follows:

(c) You must post consistent with the cetane number rating certified to you, or you may choose to post the cetane number rating determined by you according to the methods prescribed in ASTM D 975 [(as in effect on January 1, 1992)], *as incorporated by reference in section 224.3(b) of this Part*. In all cases above, the cetane number rating must be shown as a whole or half number equal to or less than the cetane number rating certified to you or determined by you.

Paragraph (2) of subdivision (g) of section 224.5 of 1 NYCRR is repealed and a new paragraph (2) is added thereto, to read as follows:

(2) *Diesel motor fuel—Minimum cetane number.*

Text of proposed rule and any required statements and analyses may be obtained from: Ross Anderson, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-3146, e-mail: Ross.Anderson@agmkt.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Consensus Rule Making Determination

The proposed rule will amend 1 NYCRR sections 224.2, 224.3(b), 224.5(g)(2) and 224.10(c). 1 NYCRR section 224.2 currently incorporates by reference section 5 in the 2004 edition of the Annual Book of ASTM Standards, which sets forth procedures for evaluating petroleum products. 1 NYCRR sections 224.3(b) and 224.10(c) currently incorporate by reference specification number D 975 in the 1992 edition of the Annual Book of ASTM Standards, which sets forth standards for diesel fuels. 1 NYCRR section 224.5(g)(2) currently requires distributors and refiners of diesel motor fuel to certify such fuel's "maximum cloud point." The proposed rule would amend 1 NYCRR section 224.2 to incorporate by reference section 5 in the 2006 edition of the Annual Book of ASTM Standards, would amend 1 NYCRR sections 224.3(b) and 224.10(c) to incorporate by reference the 2005 version of specification number D 975 and would amend 1 NYCRR section 224.5(g)(2) to delete the requirement that distributors and refiners of diesel motor fuel must certify such fuel's "maximum cloud point."

The proposed rule meets the definition of "consensus rule", set forth in SAPA section 102(11)(c), in that it is not controversial. The proposed rule will amend 1 NYCRR sections 224.2, 224.3(b) and 224.10(c) by incorporating by reference more current procedures and standards set forth in the Annual Book of ASTM Standards. Such procedures and standards have already been reviewed and approved by all entities participating in, or affected by the operation of, the petroleum industry (including refiners, distributors, pipeline and ship operators, additive producers, engine manufacturers, private testing services and retailers), through their participation in the American Society for Testing and Materials, an organization that develops standards and procedures governing the composition and analysis of materials. Such procedures and standards have been adopted by nearly every state that regulates petroleum products and, furthermore, are presently used by all entities participating in, or affected by the operation of, the petroleum industry in order to conduct business, both nationally and internationally.

The proposed rule will also amend 1 NYCRR section 224.5(g)(2) by deleting the requirement that refiners and distributors of diesel motor fuel must certify such fuel's "maximum cloud point" (which is a measure of such fuel's viscosity under cold-weather conditions). The deletion of such requirement will remove a regulatory obligation imposed on those who refine and/or distribute diesel motor fuel.

Based upon the foregoing, the proposed rule is not controversial since it will incorporate by reference procedures and standards that have been developed, reviewed, approved and adopted by all entities that would be affected thereby and because it will remove an unnecessary regulatory requirement.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs or on employment opportunities.

The proposed rule will amend 1 NYCRR section 224.2 to incorporate by reference section 5 in the 2006 Annual Book of ASTM Standards (henceforth, "ASTM Annual Book (2006), section 5"), which contains specifications and test methods for evaluating petroleum products. Section 5 in the 2004 Annual Book of ASTM Standards is presently incorporated by reference and used by the Department of Agriculture and Markets' Bureau of Weights and Measures, as well as by county and city bureaus of weights and measures, to evaluate petroleum products. ASTM Annual Book (2006), section 5 differs from, and improves upon, section 5 in the 2004 edition in that the former contains methods for testing petroleum products that incorporate more current procedures and technology than are set forth in section 5 in the 2004 edition. The proposed rule, by incorporating ASTM Annual Book (2006), section 5 by reference, will only affect the methods used by the Department and local Weights and Measures agencies to evaluate petroleum products and will not, therefore, have any adverse impact upon jobs or employment opportunities.

The proposed rule will also amend 1 NYCRR sections 224.3(b) and 224.10(c) to incorporate by reference the 2005 ASTM standard for diesel fuel ("the 2005 standard"), in place of the standard first published in 1992 that is presently incorporated by reference. The 2005 standard lowers the permissible amount of sulfur that may be in diesel fuel, to coincide with requirements enforced by the United States Environmental Protection Agency, and also adds lubricity standards, to ensure that lower sulfur diesel fuel does not damage diesel engines presently in use. The 2005 standard is pre-emptive upon the states and, furthermore, is complied with by all entities participating in, or affected by the operation of, the petroleum industry, so that they may conduct business throughout the country. The proposed rule, by incorporating the 2005 standard by reference, will not, therefore, have any adverse impact upon jobs or employment opportunities.

The proposed rule will, finally, amend 1 NYCRR section 224.5(g)(2) to delete the requirement that refiners and distributors of diesel motor fuel must certify the "maximum cloud point" of such fuel. Cloud point is a measurement of a diesel motor fuel's cold flow properties; diesel motor fuel typically crystallizes and becomes more viscous as its temperature decreases, thereby decreasing its utility as a fuel. It is, however, no longer necessary for a refiner or distributor to certify such fuel's cloud point since certain chemicals are now added to diesel motor fuel during the winter months to make it less viscous, and a measure of its cloud point does not indicate whether or not such chemicals have been added. The proposed rule, by deleting the requirement that refiners and distributors of diesel motor fuel must certify such fuel's maximum cloud point, will not, therefore, have any adverse impact upon jobs or employment opportunities.

Department of Correctional Services

NOTICE OF ADOPTION

Release of Inmate Data

I.D. No. COR-05-06-00002-A

Filing No. 526

Filing date: May 1, 2006

Effective date: May 17, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 51.14 of Title 7 NYCRR.

Statutory authority: Correction Law, sections 29(2) and 112

Subject: Release of inmate data.

Purpose: To establish guidelines for the release on inmate data.

Text or summary was published in the notice of proposed rule making, I.D. No. COR-05-06-00002-P, Issue of February 1, 2006.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

Additional matter required by statute: No additional material required by statute.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Incoming Inmate Correspondence

I.D. No. COR-05-06-00015-A

Filing No. 527

Filing date: May 1, 2006

Effective date: May 17, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Repeal of section 52.7 of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Incoming inmate correspondence.

Purpose: To repeal an invalid rule.

Text or summary was published in the notice of proposed rule making, I.D. No. COR-05-06-00015-P, Issue of February 1, 2006.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

Additional matter required by statute: No additional material required by statute.

Assessment of Public Comment

The agency received no public comment.

gates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0105, 13-0340-b, 13-0340-e, and 13-0340-g, which authorize the adoption of regulations for the management of summer flounder, scup and monkfish, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission and with applicable provisions of fishery management plans adopted pursuant to the Federal Fishery Conservation and Management Act.

Under the FMP for summer flounder and scup, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest, assuming the state's regulations are unchanged and that harvest patterns and rates remain the same as the previous year. If the projected harvest for a state exceeds that state's assigned quota, that state is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the state from exceeding of its assigned quota. ASMFC reviews each state's regulations and must determine that they are compliant with the FMP. Accordingly, failure to adopt revised regulations for 2006 in a timely matter will result in a non-compliance determination by ASMFC and the Secretary of Commerce, and the imposition of a total closure of the summer flounder fishery in New York State, with significant adverse impacts to the State's economy.

Therefore, in order to prevent imposition of a federal closure for the recreational and commercial fisheries for summer flounder, and the economic hardship that would be associated with such closure, this emergency rule adopts the specific measures necessary to comply with the FMPs. New York's projected harvests for summer flounder in 2006 exceed the State's assigned quota by 26%. The regulatory changes in this emergency rule, which have been approved by ASMFC, are calculated to achieve at least a 26% reduction for summer flounder.

The changes to the FMP for scup allow for immediate expansion of the recreational fishing season for the species. This emergency action is necessary to protect the general welfare of the people of the State by allowing the recreational fishing industry, specifically, the bait and tackle industry, the party charter boat industry, and the marine recreational anglers, to take immediate advantage of the opportunities presented by a longer open season for scup, consistent with the Interstate FMP. New York State's marine recreational fisheries for the species will derive significant economic benefits as a result of the expanded season. Such benefits would not be realized in 2006 by following the course of normal rule making pursuant to SAPA § 202(1). Delaying implementation of these amendments to 6 NYCRR Part 40 would adversely impact New York's recreational fishing industry by unnecessarily depriving them of the economic benefits associated with the expanded season.

On April 28, 2005, pursuant to the Federal Fishery Conservation and Management Act, the National Marine Fisheries Service (NMFS) revised the federal regulations (50 CFR Part 648) to lower monkfish minimum size limits for all vessels participating in the federal fishery for this species, but never directly notified the Department. New York's current size limit for monkfish is higher than the federal limit. Adjacent states have lowered their size limits to be consistent with the federal rules and the FMP for monkfish. New York is currently the only state with the higher size limit.

The emergency rule making lowers New York's size limit for monkfish in order to achieve consistency with federal regulations and with regulations in neighboring states (size limit: 17" total length, 11" tail length). Prior to this amendment, New York's size limit for monkfish was 21" total length, 14" tail length, which prevented New York foodfish dealers from taking in product from neighboring states where the size limit was lower. In addition, fishermen with federal permits could not land monkfish in New York if the fish were under New York's size limit, even though the fish were taken legally from adjacent federal EEZ waters in accordance with the federal size limit. The emergency rule making corrects this inequity. There is no conservation benefit associated with maintaining New York's higher size limit. Emergency rule making is necessary to relieve the unnecessary economic hardship imposed by current regulations.

The promulgation of this regulation on an emergency basis is necessary for the Department to maintain compliance with the FMPs for summer flounder, scup, and monkfish, to avoid closure of the summer flounder fisheries and the economic hardship that would be associated with such closure, and to provide economic relief to the recreational and commercial fishing industries.

Subject: Marine fishing regulations.

Purpose: To control the recreational and commercial harvest and possession of marine fish species (summer flounder, scup and monkfish).

Department of Environmental Conservation

**EMERGENCY/PROPOSED
RULE MAKING
NO HEARING(S) SCHEDULED**

Marine Fishing Regulations

I.D. No. ENV-20-06-00001-EP

Filing No. 523

Filing date: April 26, 2006

Effective date: April 26, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 40.1(f) and (i) of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 13-0105, 13-0340-b, 13-0340-e and 13-0340-g

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Pursuant to Section 13-0371 of the ECL, New York State participates in the Atlantic States Marine Fisheries Compact administered through the Atlantic States Marine Fisheries Commission (ASMFC) to promote cooperative utilization of marine and anadromous fish species. The principle mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fishery Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented, in a timely manner, provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promul-

Text of emergency/proposed rule: Part 40 of Title 6 of the Official Compilation of New York Codes, Rules and Regulations, entitled "Marine Fish," is amended as follows:

Subdivision 40.1 (f) is amended to read as follows:
 (f) "Table A-Recreational fishing."

Species	Open Season	Minimum Length	Possession Limit
Striped Bass (except the Hudson River north of the George Washington Bridge)	April 15 - Dec. 15	Licensed Party/ Charter Boat anglers	2
		All other anglers	1
		28" TL >40" TL (Total Length)	1
Red Drum	All year	No minimum size limit	No limit for fish less than 27" TL Fish greater than 27" TL shall not be possessed
Tautog	Oct. 1 - May 31	14" TL	10
American Eel	All year	6" TL	50
Pollock	All year	19" TL	No limit
Haddock	All year	19" TL	No limit
Atlantic cod	All year	22" TL	No limit
Summer flounder	[April 29 - Oct. 31] May 6 - Sept. 12	[17.5"] 18" TL	[5] 4
Yellowtail Flounder	All year	13" TL	No limit
Atlantic Sturgeon	No possession allowed		
Spanish Mackerel	All year	14" TL	15
King Mackerel	All year	23" TL	3
Cobia	All year	37" TL	2
Monkfish (Goosefish)	All year	[21] 17" TL [14] 11" tail length #	No limit
Weakfish	All year	16" TL 10" Fillet length + 12" Dressed length**	6
Bluefish	All year	No minimum size limit for the first 10 fish; 12" TL for the next 5 fish.	15, no more than 10 of which shall be less than 12" TL.
Winter Flounder	April 1 - May 30	12" TL	10
Scup (porgy)	[July 1] June 1 - Aug. 31	10.5" TL	25
licensed party/ charter boat anglers	Sept. 1 - Oct. 31	10.5" TL	60

Scup (porgy)	[July] June 1 - Oct. 31	10.5" TL	25
All other anglers			
Black Sea Bass	All year	12" TL	25
American Shad	All year	No minimum size limit	5
Hickory Shad	All year	No minimum size limit	5
Oyster toadfish	Jan. 1 - May 14 and July 16 - Dec. 31	10" TL	3
Large & Small Coastal Sharks	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###
###, ###			
Pelagic Sharks	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###
++,###			
Prohibited Sharks***, ###	No possession allowed		

* Total length is the longest straight line measurement from the tip of the snout, with the mouth closed, to the longest lobe of the caudal fin (tail), with the lobes squeezed together, laid flat on the measuring device.

The tail length is the longest straight line measurement from the tip of the caudal fin (tail) to the fourth cephalic dorsal spine (all dorsal spines must be intact), laid flat on the measuring device.

+ The fillet length is the longest straight line measurement from end to end of any fleshy side portion of the fish cut lengthwise away from the backbone, which must have the skin intact, laid flat on the measuring device.

** Dressed length is the longest straight line measurement from the most anterior portion of the fish, with the head removed, to the longest lobe of the caudal fin (tail), with the caudal fin intact and with the lobes squeezed together, laid flat on the measuring device.

Large and Small Coastal Sharks include those shark species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.

++Pelagic sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.

***Prohibited sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations.

###Applicable provisions of the following are incorporated herein by reference: 50 CFR Part 635-Atlantic Highly Migratory Species, final rule as adopted by U.S. Department of Commerce as published in the Federal Register, Volume 64, Number 103, pages 29135-29160, May 28, 1999, and as amended in volume 68, Number 247, pages 74746-74789, December 24, 2003. A copy of the federal rule incorporated by reference herein may be viewed at: New York State Department of Environmental Conservation, Bureau of Marine Resources, 205 N. Belle Mead Road, East Setauket, New York, 11733.

****See Special Regulations contained in 6NYCRR 40.1(h)(3).

Subdivision 40.1(i) is amended to read as follows:
 (i) "Table B - Commercial fishing."

Species	Open Season	Minimum Length	Trip Limit
Striped Bass (the area east of a line drawn due north from the mouth of Wading River Creek & east of a line at 73 degrees 46 minutes west longitude, which is near the terminus of East Rockaway Inlet).	July 1 - Dec. 15 #	Not less than 24" TL nor greater than 36" TL	See Subdivision (j) of this Section
Red Drum	All year	No minimum size limit	No limit for fish less than 27" TL Fish greater than 27" TL shall not be possessed
Tautog	April 8 to last day of February	14" TL	25 per vessel (except, 10 per vessel when fishing lobster pot gear and more than six lobsters are in possession)
American Eel	All year	6" TL	No limit
Pollock	All year	19" TL	No limit
Haddock	All year	19" TL	No limit
Atlantic cod	All year	22" TL	No limit
Summer flounder	All year	14" TL	A trip limit set by the department in consultation with the commercial fishing industry, consistent with the requirements of the Interstate Fishery Management Plan for Summer Flounder. The Department, in its discretion, may establish a weekly limit authorizing holders of commercial summer flounder permits to possess and land up to a specified amount of summer flounder in a seven day period.
Yellowtail flounder	All year	13" TL	No limit
Atlantic sturgeon	No possession allowed		
Spanish mackerel	All year	14" TL	3,500 pounds in possession, per vessel
King mackerel	All year	23" TL	3,500 pounds in possession, per vessel
Cobia	All year	37" TL	2 per vessel

Monkfish (Goosefish)	All year	[21] 17" TL [14] 11" Tail length +	No more than 25% of the total weight of Monkfish landed per trip may be monkfish livers	Pelagic Sharks ***,+++	As per Title 50 CFR, Part 635+++	As per Title 50 CFR, Part 635+++	As per Title 50 CFR, Part 635+++
Weakfish	Hook and Line April 1 - June 24 and August 28 - Nov. 15 All other gears April 1 - June 24 and August 28 - Nov. 15 June 25 - Aug. 27 and Nov. 16 - Mar. 31	16" TL 10" fillet length** 12" Dressed length##	No limit No limit No more than 300 pounds, per vessel, in the round***, and provided that at least an equal poundage of other foodfish species caught during the same trip is on board the vessel	Prohibited Sharks ###,+++	No possession allowed		
Bluefish	Jan. 1 - Dec. 31	9" TL	A trip limit set by the department and adjusted in consultation with the commercial fishing industry				
Winter flounder	Pound and Trap nets Jul 26 - June 14 Fyke nets Oct. 1 - Mar. 22 All other gear Dec. 1 - June 13	12" TL 12" TL 12" TL	No limit No limit No limit				
Scup	All year	9"	A trip limit set by the department to be consistent with the requirements of the Interstate Fishery Management Plan for Scup. The Department, in its discretion, may establish a weekly limit or a biweekly limit authorizing holders of New York State Commercial Foodfish Licenses to possess and land up to a specified maximum quantity of scup in a seven day (weekly limit) or fourteen day (biweekly limit) period.				
Black Sea Bass	All year	11" TL	A trip limit set by the department to be consistent with the requirements of the Interstate Fishery Management Plan for Black Sea Bass				
American Shad	All year	No minimum length	No more than 5% of the total weight of all foodfish landed per trip				
Oyster toadfish	Jan. 1 - May 14 and July 16 - Dec. 31	10" TL	25				
Large & Small Coastal Sharks ++,+++	As per Title 50 CFR, Part 635+++	As per Title 50 CFR, Part 635+++	As per Title 50 CFR, Part 635+++				

* Total length is the longest straight line measurement from the tip of the snout, with the mouth closed, to the longest lobe on the caudal fin (tail), with the lobes squeezed together, laid flat on the measuring device.

The commercial striped bass fishery may be closed before December 31st if the allowable harvest cap is projected to be met prior to such date.

+ The tail length is the longest straight line measurement from the tip of the caudal fin (tail) to the fourth cephalic dorsal spine All dorsal spines must be intact), laid flat on the measuring device.

** The fillet length is the longest straight line measurement from end to end of any fleshy side portion of the fish cut lengthwise away from the backbone, which must have the skin intact, laid flat on the measuring device.

The dressed length is the longest straight line measurement from the most anterior portion of the fish, with the head removed, to the longest lobe of the caudal fin (tail), with the caudal fin intact and with the lobes squeezed together, laid flat on the measuring device.

++ Large and Small Coastal Sharks include those shark species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

*** Pelagic sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

Prohibited sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

+++ Applicable provisions of the following are incorporated herein by reference: 50 CFR Part 635-Atlantic Highly Migratory Species, final rule as adopted by U.S. Department of Commerce as published in the Federal Register, Volume 64, Number 103, pages 29135-29160, May 28, 1999, and as amended in volume 68, Number 247, pages 74746-74789, December 24, 2003. A copy of the federal rule incorporated by reference herein may be viewed at: New York State Department of Environmental Conservation, Bureau of Marine Resources, 205 N. Belle Mead Road, East Setauket, New York, 11733.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire July 24, 2006.

Text of rule and any required statements and analyses may be obtained from: Stephen W. Heins, Department of Environmental Conservation, 205 N. Belle Meade Rd., Suite 1, East Setauket, NY 11733-3400, (631) 444-0435, e-mail: swheins@dec.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Additional matter required by statute: Pursuant to article 8 of the Environmental Conservation Law, a negative declaration is on filed with the department.

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Regulatory Impact Statement

1. Statutory authority:
Environmental Conservation Law (ECL) Sections 13-0340-b, 13-0340-e, and 13-0340-g authorize the Department of Environmental Conservation (Department) to establish, by regulation, open seasons, size limits, catch limits, possession and sale restrictions and manner of taking for summer flounder, scup and monkfish. ECL Section 11-0303 directs the Department to efficiently manage the fish and wildlife resources of the State. ECL Section 13-0105 requires the Department to manage marine fisheries resources to maintain long term health and abundance, and to ensure that these resources are sustained in usable abundance and diversity for future generations.

2. Legislative objectives:
It is the objective of the above-cited legislation that the Department manage marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies and interstate agreements.

3. Needs and benefits:
Pursuant to Section 13-0371 of the ECL, New York State participates in the Atlantic States Marine Fisheries Compact administered through the Atlantic States Marine Fisheries Commission (ASMFC) to promote cooperative utilization of marine and anadromous fish species. The principle mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fishery Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented, in a timely manner, provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0105, 13-0340-b, 13-0340-e, and 13-0340-g, which authorize the adoption of regulations for the management of summer flounder, scup and monkfish, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission and with applicable provisions of fishery management plans adopted pursuant to the Federal Fishery Conservation and Management Act.

Under the FMP for summer flounder and scup, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest, assuming the state's regulations are unchanged and that harvest patterns and rates remain the same as the previous year. If the projected harvest for a state exceeds that state's assigned quota, that state is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the state from exceeding of its assigned quota. ASMFC reviews each state's regulations and must determine that they are compliant with the FMP. Accordingly, failure to adopt revised regulations for 2006 in a timely matter will result in a non-compliance determination by ASMFC and the Secretary of Commerce, and the imposition of a total closure of the summer flounder fishery in New York State, with significant adverse impacts to the State's economy.

Therefore, in order to prevent imposition of a federal closure for the recreational and commercial fisheries for summer flounder, and the economic hardship that would be associated with such closure, this emergency rule adopts the specific measures necessary to comply with the FMPs. New York's projected harvests for summer flounder in 2006 exceed the State's assigned quota by 26%. The regulatory changes in this emergency rule, which have been approved by ASMFC, are calculated to achieve at least a 26% reduction for summer flounder.

The changes to the FMP for scup allow for immediate expansion of the recreational fishing season for the species. This emergency action is necessary to protect the general welfare of the people of the State by allowing the recreational fishing industry, specifically, the bait and tackle industry, the party/charter boat industry, and the marine recreational anglers, to take immediate advantage of the opportunities presented by a longer open season for scup, consistent with the Interstate FMP. New York State's marine recreational fisheries for the species will derive significant economic benefits as a result of the expanded season. Such benefits would not be realized in 2006 by following the course of normal rule making pursuant to SAPA § 202(1). Delaying implementation of these amendments to 6 NYCRR Part 40 would adversely impact New York's recreational fishing industry by unnecessarily depriving them of the economic benefits associated with the expanded season.

On April 28, 2005, pursuant to the Federal Fishery Conservation and Management Act, the National Marine Fisheries Service (NMFS) revised the federal regulations (50 CFR Part 648) to lower monkfish minimum size limits for all vessels participating in the federal fishery for this species, but never directly notified the Department. New York's current size limit for monkfish is higher than the federal limit. Adjacent states have lowered their size limits to be consistent with the federal rules and the FMP for monkfish. New York is currently the only state with the higher size limit. The emergency rule making lowers New York's size limit for monkfish in order to achieve consistency with federal regulations and with regulations in neighboring states (size limit: 17" total length, 11" tail length). Prior to this amendment, New York's size limit for monkfish was 21" total length, 14" tail length, which prevented New York foodfish dealers from taking in product from neighboring states where the size limit was lower. In addition, fishermen with federal permits could not land monkfish in New York if the fish were under New York's size limit, even though the fish were taken legally from adjacent federal EEZ waters in accordance with the federal size limit. The emergency rule making corrects this inequity. There is no conservation benefit associated with maintaining New York's higher size limit. Emergency rule making is necessary to relieve the unnecessary economic hardship imposed by current regulations.

The promulgation of this regulation on an emergency basis is necessary for the Department to maintain compliance with the FMPs for summer flounder, scup, and monkfish, to avoid closure of the summer flounder

fisheries and the economic hardship that would be associated with such closure, and to provide economic relief to the recreational and commercial fishing industries. Specific major changes to the regulations include the following items:

Summer Flounder

Implement an open season of May 6 to September 12 for the summer flounder recreational fishery. The current fishing season for summer flounder is open from April 29 to October 31. Also, lower the recreational possession limit from 5 fish per person per trip to 4 fish per person per trip, and raise the minimum size limit from 17.5" total length (TL) to 18" TL.

Scup

Implement an open season from June 1 through October 31 for the scup recreational fishery. The current fishing season for scup in New York is open July 1 to October 31. The possession limits and size limits are unchanged.

Monkfish

Lower the minimum size limit for whole fish from 21" TL to 17" TL and lower the minimum size limit for tails from 14" TL to 11" TL for both the commercial and recreational fisheries.

4. Costs:

(a) Cost to State government:

There are no new costs to state government resulting from this action.

(b) Cost to Local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action.

Certain regulated parties (party/charter vessels, bait and tackle shops) may experience some adverse economic effects through lost economic opportunities due to the restrictions on summer flounder. These same regulated parties may experience some positive economic effects through new opportunities provided by the longer scup season.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

The Department of Environmental Conservation will incur limited costs associated with both the implementation and administration of these rules. The implementation costs will be associated with the public notification and final adoption of these regulations, and costs relating to the expense of updating informational materials and notifying recreational harvesters, party and charter boat operators and other recreational support industries of the new rules.

There will also be additional costs associated with enforcement of these new regulations.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

None.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

The following significant alternatives, listed by species, have been considered by the Department and rejected for the reasons set forth below:

Summer flounder alternatives:

(1) One alternative considered was a more conservative approach, one which would result in a 38% reduction and a higher probability of keeping New York anglers from over-harvesting in 2006. This could be accomplished with an increase in the proposed size limit of 18 inches to 18.5 inches. This was rejected because higher size limits impose have a disproportionately negative effect on shore-based anglers and those boating anglers who are restricted to fishing inside the bays. It would have little to no effect on those boating anglers who can fish in the ocean.

(2) No Action (no amendment to regulations).

The "no action" alternative would leave current regulations in place and defer short term adverse economic impacts to the summer flounder fishery from regulations. This option would, however, likely result in a non-compliance determination by ASMFC and NMFS, which would bring about a federal closure of all fishing for summer flounder in New York under ACFCMA. This would have a much more severe economic impact than the imposition of tighter restrictions.

Scup alternatives:

(1) One alternative considered was raising the bag limit to 60 fish per angler during the open season, removing the differential bag limit for party/charter boat anglers that is in effect during September and October under the current regulation, and leaving the open season as it is. This alternative was rejected because the preferred alternative reflects a re-

gional approach mutually decided upon by New York, Connecticut, Rhode Island and Massachusetts. The four-state regional approach, approved by ASMFC, provides consistent regulations, which facilitate law enforcement in boundary waters and reduce competition for customers among party and charter boats in the different states.

(2) No Action (status quo regulations).

The "no action" alternative would leave current regulations in place and forego the economic benefits to the scup fishery which would result from the earlier season opener.

Monkfish alternatives:

(1) No Action (status quo regulations).

The "no action" alternative would leave current regulations in place and forego the economic benefits to the seafood dealers and markets and our fishermen. All other states have the lower size limits allowed under the FMP, which puts New York's dealers, markets and fishermen at a disadvantage.

9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and Regional Fishery Management Council FMPs.

10. Compliance schedule:

Regulated parties will be notified of the regulation changes by mail, through appropriate news releases, and via the Department's website. The regulations will take effect immediately upon filing with the Department of State.

Regulatory Flexibility Analysis

1. Effect of the regulations:

a. Summer flounder. Pursuant to Section 13-0371 of the ECL, New York State participates in the Atlantic States Marine Fisheries Compact administered through the Atlantic States Marine Fisheries Commission (ASMFC) to promote cooperative utilization of marine and anadromous fish species. The principle mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fishery Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented, in a timely manner, provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0105, 13-0340-b, 13-0340-e, and 13-0340-g, which authorize the adoption of regulations for the management of summer flounder, scup and monkfish, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission and with applicable provisions of fishery management plans adopted pursuant to the Federal Fishery Conservation and Management Act.

Under the FMP for summer flounder and scup, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest, assuming the state's regulations are unchanged and that harvest patterns and rates remain the same as the previous year. If the projected harvest for a state exceeds that state's assigned quota, that state is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the state from exceeding of its assigned quota. ASMFC reviews each state's regulations and must determine that they are compliant with the FMP. Accordingly, failure to adopt revised regulations for 2006 in a timely matter will result in a non-compliance determination by ASMFC and the Secretary of Commerce, and the imposition of a total closure of the summer flounder fishery in New York State, with significant adverse impacts to the State's economy.

Therefore, in order to prevent imposition of a federal closure for the recreational and commercial fisheries for summer flounder, and the economic hardship that would be associated with such closure, this emergency rule adopts the specific measures necessary to comply with the FMPs. New York's projected harvests for summer flounder in 2006 exceed the State's assigned quota by 26%. The regulatory changes in this emergency rule, which have been approved by ASMFC, are calculated to achieve at least a 26% reduction for summer flounder.

b. Scup. There were 500 licensed party/charter vessels operating in New York during 2005 and an unknown number of retail and wholesale

marine bait and tackle shop businesses operating in New York in that year. Many currently licensed party and charter boat owners and operators, as well as bait and tackle businesses, will benefit financially from the opening of the recreational scup season on June 1. This is particularly important because the closed season for the recreational winter flounder fishery was recently amended to begin on May 31 instead of June 30. The additional opportunity to fish for scup during the month of June may provide some economic relief to party/charter boat businesses and bait and tackle shops who are affected by the earlier season closure for winter flounder.

c. Monkfish. New York's current commercial and recreational size limits for monkfish are both higher than the federal size limits. Adjacent states have lowered their size limits to be consistent with the federal rules and the FMP for monkfish. Current state regulations for monkfish place New York's seafood dealers and harvesters at a competitive disadvantage with the rest of the nation due to a disparity in size limits. The emergency rule making lowers New York's size limit for monkfish in order to achieve consistency with federal regulations and with regulations in neighboring states (size limit: 17" total length, 11" tail length). Prior to this amendment, New York's size limit for monkfish was 21" total length, 14" tail length, which prevented New York foodfish dealers from taking in product from neighboring states where the size limit was lower. In addition, fishermen with federal permits could not land monkfish in New York if the fish were under New York's size limit, even though the fish were taken legally from adjacent federal EEZ waters in accordance with the federal size limit. The emergency rule making corrects this inequity. There is no conservation benefit from leaving New York's size limit in place.

There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or tackle. Therefore, no local governments are affected under these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

5. Minimizing adverse impact:

The purpose of these regulations is to constrain the recreational harvest of these species by controlling the length of the fishing season, the minimum size limits, and possession limits consistent with the standards established in any Fishery Management Plan (FMP) and neighboring states. Since these regulatory amendments are consistent with federal and interstate fishery management plans, the Department anticipates limited or no adverse impacts.

Ultimately, the maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat fisheries as well as wholesale and retail outlets and other support industries for recreational fisheries. Failing to comply with FMPs and take required actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. Regulations are proposed which provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

6. Small business and local government participation:

The development of this proposal has drawn upon input from the Marine Resources Advisory Council, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon consultation with and recommendations received from other interested and affected parties, including recreational fishing organizations, party and charter boat owners and operators, retail and wholesale bait and tackle shop owners and state law enforcement personnel. There was no special effort to contact local governments because the rule does not affect them.

7. Economic and technological feasibility:

The changes required by this action have been determined to be economically feasible for the majority of the affected parties.

There is no additional technology required for small businesses. These regulations do not have direct application to local governments, so there are no economic or technological impacts for any such bodies.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The summer flounder, scup

and monkfish fisheries directly affected by the emergency rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the state. Further, the emergency rule does not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the emergency amendments of 6 NYCRR Part 40, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

The Department of Environmental Conservation (Department) has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities and in fact may augment jobs and employment. Therefore, a job impact statement is not required.

There were 500 licensed party/charter vessels operating in New York during 2005 and an unknown number of retail and wholesale marine bait and tackle shop businesses operating in New York in that year. Many currently licensed party and charter boat owners and operators, as well as bait and tackle businesses, will be affected by these regulations. The regulations will likely result in a short term economic gain due to the relaxation in allowable catch and availability of scup fishery resources for the affected parties. There may be some adverse effect on the number of fishing trips and/or lower bait and tackle sales during the upcoming fishing season as a result of the proposed summer flounder regulatory amendments.

The purpose of these regulations is to allow appropriate harvest of certain marine fish species to maintain fishing mortality at prescribed levels and to continue to rebuild or maintain stock biomass. The potential impact of these regulations may be that some recreational party and charter boat owners experience continued reductions in customers, and bait and tackle businesses could continue to lose sales revenue from a decline in bait and tackle sales during the proposed fishing season. However, based on outreach with members of the recreational summer flounder and scup fisheries, the Department anticipates that there could be a slight positive impact on jobs as a result of the proposed changes, primarily due to the earlier opening to the scup season. Moreover, in the long term, the effect of this proposed rule on jobs and employment opportunities should be positive. Protection of the summer flounder and scup resources is essential to the survival of the party and charter boat operations and bait and tackle businesses that support in these fisheries.

The maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat owners and operators, wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. Any short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest, and to continue to rebuild or maintain them for future utilization.

The impact on jobs related to the monkfish fishery is expected to be slightly positive, without detriment to the fishery resource. There is no biological or conservation justification for keeping the higher size limits, and lowering them will allow product harvested from out of state to flow into our markets, increasing local sales, and allowing our fishermen to take advantage of increased product availability.

Based on the above and Department's past experience with the adoption of finfish rules, the Department has concluded that there will not be any substantial adverse impact on jobs or employment opportunities as a consequence of these amendments.

Proposed action: Amendment of sections 86-1.62 and 86-1.63 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(3)

Subject: NYS AP-DRGs, service intensity weights and group average arithmetic inlier lengths of stay.

Purpose: To update the NYS AP-DRG patient classification system to be consistent with changes made to the DRG classification system to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

Substance of proposed rule (Full text is not posted on a State website): 86-1.62 - Service Intensity Weights and Group Average Arithmetic Inlier Lengths of Stay

The proposed amendments of section 86-1.62 of Title 10 (Health) NYCRR are intended to change the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weight (SIWs) and group average arithmetic inlier length of stay (LOS) for each DRG.

The DRG classification system used in the hospital case payment system is updated to incorporate those changes made by Medicare for use in the prospective payment system and additional changes to identify medically appropriate patterns of health resource use for services that are efficiently and economically provided. The SIWs were revised accordingly to reflect the costs of the redistributed cases.

86-1.63 - Non-Medicare Trimponts

The proposed amendments of section 86-1.63 of Title 10 (Health) NYCRR are intended to change the non-Medicare trimponts used to determine the outlier days in the hospital case based payment system.

The changes in the DRG classification system described above (Section 86-1.62 of Title 10 (Health) NYCRR) cause a modification of the non-Medicare trimponts to reflect the redistribution of cases from the existing DRGs to the new DRGs. These new trimpont values are provided in Section 86-1.63.

The changes to the DRG classification system will enable providers to place patients in the most appropriate DRG and, therefore, they will receive adequate reimbursement for services provided. In the aggregate, these changes will have a budget-neutral impact on the reimbursement system.

The Department is statutorily required to update the grouper to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

Statutory Authority:

The authority for the subject regulations is contained in sections 2803(2) and 2807(3) of the Public Health Law (PHL), which require the State Hospital Review and Planning Council (SHRPC), subject to the approval of the Commissioner, to adopt and amend rules and regulations for hospital reimbursement rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. PHL section 2807-c (3) authorizes the SHRPC to adopt rules subject to the Commissioner's approval, to adjust the diagnosis related groups (DRGs) or establish additional DRGs to reflect subsequent revisions applicable to reimbursement for discharges of Medicare beneficiaries or to identify medically appropriate patterns of health resource use efficiently and economically provided and to subsequently amend the service intensity weights (SIWs) and trimponts for each DRG.

Legislative Objectives:

The Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health resource use and services.

Needs and Benefits:

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

NYS AP-DRG Patient Classification System

I.D. No. HLT-20-06-00002-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

The SIWs and non-Medicare trimpoints are an integral part of the 2006 hospital Medicaid and like payor inpatient rates. The Department makes changes to the grouper used to assign inpatient cases to the appropriate DRG. As part of this process, the Department may make modifications, revisions and create new DRGs that reflect the current resources consumed by inpatients. After the grouper is modified, the SIWs and trimpoints must be recalculated consistent with the newly created and updated list of DRGs, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Additionally, the amendments provide payors of inpatient hospital services with the new values used to determine the correct case base payment for each DRG so hospital claims can be submitted and paid in a timely manner.

COSTS:

Costs to State Government:

The proposed regulations do not impact the cost base upon which payments are made. Therefore, costs to the State are not expected to markedly change as a result of these amendments.

Costs of Local Government:

No increase in costs to local governments is anticipated as a result of these amendments.

Costs to Private Regulated Parties:

In the aggregate, there will be no increases or decreases in hospital revenues as a result of these amendments. Changes to the DRG classification system will cause a realignment of cases among the DRGs. Those cases that require more intensive provision of care will realize an increase in the SIW (and reimbursement) for that DRG. The removal of such cases from the DRG to which they were previously assigned will decrease the SIW (and reimbursement) for that DRG. Therefore, revenues will shift among individual hospitals depending upon the diagnosis of and procedures performed on the patients they treat. The extent of the shift in revenues cannot be determined because it will depend upon future patient services.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

This regulation affects the costs to counties and New York City for services provided to Medicaid beneficiaries as described above. It imposes no program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

Based upon suggestions/recommendations received from hospital industry representatives, the Department has included adjustments that provide more appropriate recognition of the costs related to new medical technologies. No other significant alternatives were considered.

Federal Standards:

The proposed rule does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed rule establishes rates of payment as of January 1, 2006; there is no period of time necessary for regulated parties to achieve compliance.

Contact Person: Mr. William R. Johnson

New York State Department of Health
Office of Regulatory Reform
Corning Tower Building, Room 2415
Empire State Plaza
Albany, New York 12237
(518) 473-7488
(518) 486-4834 (FAX)
REGSQNA@health.state.ny.us

Comments submitted to Department personnel other than this contact person may not be included in any assessment of public comment issued for this regulation.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

Compliance Requirements

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of this rule.

Professional Services

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to make current regulations consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS), and add new, delete or redefine existing DRGs to reflect medically appropriate patterns of health resource use. The current SIWs and trimpoints are also updated to be consistent with the proposed DRG modifications.

Compliance Costs

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. In the aggregate, as a result of these amendments, there will be no anticipated increases or decreases in hospitals' revenues in the aggregate. Revenues will shift among individual hospitals depending upon the diagnoses of and procedures performed on the patients they treat and the extent to which they would be classified into the modified diagnosis related groups.

Minimizing Adverse Impact

The proposed amendments will be applied to all general hospitals. The Department of Health considered approaches specified in section 202-b(1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Small Business and Local Government Participation

Local governments and small businesses were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its November 17, 2005 meeting. That agenda is mailed to general hospitals qualifying as small businesses, providers, members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations that represent the interests and concerns of hospitals across New York State, including small businesses and local governments. This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Rural Area Flexibility Analysis

Effect on Rural Areas

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. In the aggregate, as a result of these amendments, there will be no increases or decreases in hospitals' revenues. Revenues will shift among individual hospitals depending upon the diagnoses of and approved procedures performed on the patients they treat.

Minimizing Adverse Impact

The proposed amendments will be applied to all general hospitals. The Department of Health considered the approaches specified in section 202-bb(2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Opportunity for Rural Area Participation

Rural areas were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its November 17, 2005, meeting. That agenda is mailed to members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations, which represent the needs and concerns of providers across New York State, including rural areas. The amendment was described at meetings of the Fiscal Policy Committee prior to the filing of the notice of proposed rulemaking.

This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations update the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weights and length of stay standards for each DRG. This classification system, which has been in effect since 1988 in New York State, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. Since this is merely an update, the proposed regulations have no implications for job opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Non-Transplant Anatomic Banks

I.D. No. HLT-20-06-00003-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of Part 52 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 4365(1)

Subject: Minimum technical requirements for non-transplant anatomic banks.

Purpose: To refine the definition of non-transplant anatomic banks and eliminate any regulatory confusion and establish certain technical requirements that reflect current standards of practice at non-transplant anatomic banking facilities.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): This amendment to Part 52 changes existing definitions and adds new definitions to reflect currently accepted nomenclature and provide needed clarification and consistency specific to the regulation of nontransplant anatomic banks. In addition, the new Subpart 52-11 enables the Department to establish needed technical standards for nontransplant anatomic banks.

The amendment improves the definition of nontransplant anatomic bank to eliminate any regulatory confusion, decrease the likelihood of

misinterpretation by regulated parties, and clarify licensure requirements for nontransplant anatomic banks located outside New York State. Exclusions from licensure as a nontransplant anatomic bank are clarified.

The amendment includes a new Subpart 52-11, which establishes minimum technical standards for nontransplant anatomic banks. The terms whole body, whole body acquisition service, whole body user, and body segment are defined.

The amendment specifies informed consent requirements for nontransplant anatomic banks that recover nontransplant anatomic parts (whole bodies, bodies segments, organs and/or tissues) for use in research and education. Consent must be documented and any restrictions on the use of the gift, specified by the donor or donating next-of-kin, must be honored by the nontransplant anatomic bank. Requirements for documenting the consent, including those consents obtained by telephone, are specified.

The amendment requires the retrieval or acquisition of individual body segments or other nontransplant anatomic parts to be performed on the premises of a general hospital or a nontransplant anatomic bank licensed in the category of whole body acquisition service. Whole bodies, body segments, or other nontransplant anatomic parts are to be retrieved, acquired, distributed, transported, or used only for purposes authorized by Public Health Law section 4302.

Minimum staffing requirements for whole body acquisition services and whole body users are specified. Included is a provision that permits individuals who do not meet educational requirements, but who serve as director of a whole body acquisition service at the time of the adoption of this amendment, to continue as director.

Facilities requirements for whole body acquisition services and whole body users are specified. The amendment requires that whole body acquisition services and whole body users have dedicated, secure and restricted space, or approved off-site locations for preparation of whole bodies and body segments for research and/or education purposes. Access to such space must be limited to individuals directly associated with receipt and preparation of whole bodies or body segments. Minimum requirements for preparation and storage space include: a working sink; adequate counter space; suitable space for storage of chemicals; counters, tables and cabinetry built of material that may be easily disinfected and cleaned; a dedicated, refrigerated room, walk-in cooler, or cadaver drawer cooler for the storage of whole bodies and body segments; U.S. Occupational and Health Administration (OSHA)-approved eye wash stations and devices for handling, lifting and internal transporting of whole bodies and body segments; and a morgue and/or crematory compliant with federal and state standards for embalming and cremation, if embalming and/or cremation services are performed.

Record keeping requirements, supplemental to those already required in Section 52-2.9(i), are specified.

The amendment includes provisions for the appropriate transfer of whole bodies, body segments, or other nontransplant anatomic parts in compliance with existing state standards for such transfer.

The amendment outlines requirements for the disposition of nontransplant anatomic parts, including whole bodies and body segments, once their use in education and research is completed.

The amendment includes a provision that requires the nontransplant anatomic bank to implement written safety and infection control policies and procedures to ensure protection of employees from unnecessary physical, chemical and biological hazards. Requirements are specified for decontamination and disposal techniques for regulated medical waste and use of autoclave equipment. Restrictions on eating, drinking, smoking, and the application of cosmetics in work areas and the use of gloves, laboratory coats, gowns or other protective clothing are imposed.

Finally, reporting requirements are included, consistent with those already in effect for licensed tissue banks. The amendment requires nontransplant anatomic bank directors to report to the Department certain information and data regarding the bank's activities.

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqa@health.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

Statutory Authority

Article 43-B of the Public Health Law (PHL) establishes the Department's authority over the operation of tissue banks and nontransplant

anatomic banks in New York State. PHL Section 4365(1) expressly authorizes the Commissioner of Health, in consultation with the Transplant Council, to promulgate regulations to establish standards for tissue banks and storage facilities. PHL Section 4365(6) expressly authorizes the Commissioner of Health, in consultation with the Transplant Council, to establish subcategories of tissue bank licensure and develop standards specific to a subcategory. Nontransplant anatomic banks are licensed as tissue banks under 10 NYCRR Part 52, but technical standards for the operation of such facilities, except for minimal record keeping requirements, have not yet been adopted, and are proposed in this rule-making.

Legislative Objectives

The Legislature has directed the Department to ensure the highest quality of public health care by establishing regulations for licensing facilities engaged in tissue banking activities, including nontransplant anatomic banking, in New York State. Article 43-B requires the Commissioner of Health to promulgate regulations that establish standards for tissue banks and nontransplant anatomic banks; and to license and periodically inspect such facilities to evaluate operating procedures, equipment, and records to determine compliance with those standards. Such action is intended to prevent operation of substandard tissue banks and nontransplant anatomic banks.

Needs and Benefits

The demand for and use of whole bodies, body segments, organs, and tissues for medical research and health professional education have increased dramatically since the adoption of licensure requirements for tissue banks and nontransplant anatomic banks in 1991. Concerns about informed consent, and proper and respectful handling of donated human materials have been raised in the public media and in complaints received by the Department. To date, the Department has issued licenses to 70 nontransplant anatomic banks. Many facilities currently licensed to recover and/or process tissue for transplantation may redirect tissue deemed unsuitable for transplant to research and education use. Tissue banks and nontransplant anatomic banks perform a variety of banking activities, including recovery, processing, storage and distribution of nontransplant anatomic parts (whole bodies, body segments, organs, and tissues).

Anecdotal and lay press reports of body parts' theft for personal profit have increased in recent years. Concerns have also arisen regarding anatomy educational workshops and seminars using body parts in public venues, such as hotel conference rooms. However, bodies, body segments, organs, and tissues are widely used for medical research and health professional education throughout the world scientific community. Nontransplant anatomic parts for legitimate purposes in New York State are procured from many areas of the country and, in some cases, from other countries.

The amendment imposes reasonable requirements intended to ensure that all nontransplant anatomic parts recovered, processed and used in New York State are obtained with documented informed consent, and handled respectfully and safely. At the same time, the proposed regulations reflect an awareness that restrictions on use of nontransplant anatomic parts must not be so constraining as to stifle research and education endeavors in New York. The amendment seeks to address areas of concern by requiring that donated nontransplant anatomic parts be acquired, processed and/or stored in New York State only by Department-licensed nontransplant anatomic banks, or under the supervision of a licensed bank.

Definitions of whole body, whole body acquisition service, whole body user, and body segment are added, thereby establishing subcategories of nontransplant anatomic parts and nontransplant anatomic banking services so that appropriate requirements may be specified for each.

These amendments refine the definition of nontransplant anatomic bank to eliminate any regulatory confusion, decrease the likelihood of misinterpretation by regulated parties, and clarify licensure requirements for nontransplant anatomic banks located outside New York State. The new Subpart 52-11 would establish certain new technical requirements that reflect current standards of practice at nontransplant anatomic banking facilities. These requirements were developed in cooperation with the Anatomic Committee of the Associated Medical Schools of New York State and are based, in part, upon written standards prepared by that committee.

Reports of unauthorized removal and sale of body parts at several large medical educational institutions emphasized the need for oversight of whole body acquisition services, which include all anatomic gift programs operated by medical schools, and for-profit and not-for-profit independent facilities conducting business in New York State. Therefore, minimum staffing requirements for whole body acquisition services and whole body

users are detailed. To assure proper handling and use of whole bodies, whole body acquisition services must employ a director with a graduate degree in either anatomy or the health sciences. Whole body users must employ at least one staff member with a graduate degree in the health sciences, or training in either human dissection or the specific activities performed.

Facility requirements for whole body acquisition services, whole body users, and users of other nontransplant anatomic parts are set forth to address concerns about the current lack of standards for safe and appropriate handling and disposition of nontransplant anatomic parts. A provision is included to require that dissection of whole bodies and body segments occur only in dedicated rooms or at off-site locations approved by the director. General safety requirements applicable to all nontransplant anatomic banks are also added.

Department surveyors have observed that nontransplant anatomic banks often create and maintain insufficient documentation of informed consent for donation of whole bodies. To ensure that donations of whole bodies and other anatomical gifts are used only for the purposes intended by the donor or the donor's next of kin, informed consent requirements for all nontransplant anatomic banks would be expanded to identify those body segments, organs, or tissues intended for donation and their permitted uses. Provisions for documenting consent obtained by telephone are detailed.

Finally, a requirement for reporting nontransplant anatomic banking activities is added to notify the Department of changes in activities performed by the licensed nontransplant anatomic bank.

COSTS:

Costs for the Implementation of, and Continuing Compliance with, the Regulation to the Regulated Entity

Currently, staff members of all New York State medical schools that would be whole body acquisition services, meet all stipulated educational requirements. If a whole body acquisition service does not meet this proposal's staffing requirements, it may incur expenses associated with employing: (1) a nontransplant anatomic bank director who holds a graduate degree in anatomy or the health sciences; and (2) an appropriately trained morgue attendant, diener, or licensed funeral director responsible for preparation, care and maintenance of whole bodies and body segments. Full-time salaries for properly trained morgue attendants or dieners range from \$24,000 to \$46,200. Salaries for a director with the appropriate graduate degree would depend upon whether the director is full-time or part-time and other responsibilities within the institution. Full-time salaries for occupations requiring similar credentials range from \$38,000 to \$101,390. (See NYS Education Department website workforce wages.)

A whole body user may incur expenses associated with recruiting a staff member with a graduate degree in the health sciences, and training in human dissection or in the activity to be performed. Based upon information submitted in the application process, nontransplant anatomic banks currently licensed to use whole bodies and body segments in research and/or education are already likely to employ such an individual.

A whole body acquisition service not already in compliance with the proposal's new facilities requirements could incur additional expenses, as follows:

- (1) a working sink and adequate counter space for preparation of whole bodies and body segments (costs range from \$5,000 to more than \$10,000, depending on size and specifications);
- (2) counters, tables, and cabinetry made of material easily disinfected and cleaned (modular-unit base cabinets cost from \$800 to \$1,400 each);
- (3) a refrigerated storage room dedicated solely to storage of whole bodies or body segments, with lockable access doors and alarms to signal intrusion or unacceptable temperature deviation (cost varies depending on size and type, e.g., four-body crypt versus walk-in, or portable versus fixed-room, but ranges from \$12,000 to \$140,000);
- (4) a U.S. Occupational Safety and Health Administration (OSHA)-approved device for handling, lifting and internal transportation of whole bodies or body segments (a cadaver lift assembly costs approximately \$4,000); and
- (5) an OSHA-approved eye wash station (a fixed, plumbed station costs from \$300 to \$500).

A whole body user not already in compliance with the proposal's facilities requirements could incur additional expenses, as follows:

- (1) a dedicated room with lockable access doors and isolation from public view to ensure safe and respectful handling of whole bodies and body segments (costs associated with providing locks and a means to obscure the public's view are minimal);

(2) dissection tables commercially designed for that purpose (commercial dissection tables cost \$2,800 for a standard table and \$4,400 for a hinged-hood table);

(3) a working sink and adequate counter space (costs range from \$5,000 to more than \$10,000, depending on size and specifications); and

(4) an OSHA-approved eye wash station (a fixed, plumbed station costs from \$300 to \$500).

Other nontransplant anatomic banks not already in compliance with the proposal's facilities requirements could incur additional expenses, as follows:

(1) a room of sufficient size and construction with lockable doors to restrict access to individuals directly associated with the education or research conducted, and ensure isolation from public view (costs associated with providing locks and a means to obscure the public's view are minimal); and

(2) a working sink and adequate counters constructed of nonporous materials (costs range from several hundred dollars to more than \$1,000, depending on size and specifications).

Unless otherwise stated, cost estimates provided above are based upon information generally available in medical and laboratory supply catalogs and cost estimates provided by medical schools that would be required to comply with these standards.

Nontransplant anatomic banks could incur some minimal additional costs to revise written procedures, and forms/logs for recording specific information to document the donation process, informed consent, and storage and disposition of nontransplant anatomic parts. It is not possible to provide an estimate of the costs of implementing this amendment's recordkeeping provisions, since costs would vary depending upon the volume of the nontransplant anatomic parts recovered and the amount of record keeping already in place. Most research and education facilities currently identify, track and dispose of nontransplant anatomic parts in a manner consistent with these requirements as part of good research techniques and inventory procedures. Moreover, it is expected that existing staff would be able to implement these requirements, thereby avoiding added labor costs.

The above-described costs would be easily offset by the benefits to be derived from assurance of safe, appropriate and respectful handling of human bodies, body segments, organs, and tissues used in research and/or education.

Costs to State and Local Governments

State and local government agencies that operate nontransplant anatomic banks would incur the same costs and benefits as private regulated parties.

Costs to the Department of Health

The Department operates several nontransplant anatomic banks, that are subject to these regulations. However, since existing staff and facilities fulfill most of the requirements, the Department expects to incur few costs, if any, in complying with these regulations. Similarly, since new licensure application processing and surveys of nontransplant banks for compliance with the increased technical requirements would not require additional Department staff, the Department does not expect to incur additional costs in implementing the proposed regulations.

Paperwork

Nontransplant anatomic banks that are whole body acquisition services and whole body users may be required to revise their procedures for handling nontransplant anatomic parts to comply with the new requirements.

Minimal additional paperwork and printing costs would be experienced by whole body acquisition services to revise informed consent documents. Assuming such forms are in word-processing files, revisions should require no more than 10 (ten) person-hours and would be expected to be completed by the tissue bank director and existing staff. Thus, no additional labor costs should be associated with these requirements.

Local Government Mandates

The regulation imposes no new program, service, duty, or responsibility on any county, city, town, village, school district, fire district, or other special district. A municipal government or district that operates a nontransplant anatomic bank would be affected as described herein to the same extent as other regulated parties.

Duplication

This amended regulation does not duplicate any other State or federal regulation.

Alternative Approaches

No alternatives were considered in developing these regulations, since no consistent or overriding regulations or current industry standards are in place in this area.

Federal Standards

Although the U.S. Food and Drug Administration (FDA) has published rules addressing banking of human tissue intended for transplantation, these rules do not include provisions for whole bodies, body segments, organs, and tissues used in research and/or education.

Compliance Schedule

Regulated parties should be able to comply with all provisions of these amended regulations within 60 (sixty) days of the date of publication of a Notice of Adoption in the New York State Register. Consequently, the effective date of these regulations has been set at 60 (sixty) days after publication of such a Notice of Adoption.

Regulatory Flexibility Analysis

Small Business and Local Government

Effect of Rule

Small businesses to which these regulatory changes apply represent fewer than ten of the 70 nontransplant anatomic banks approved to operate in the State. The majority of nontransplant anatomic banks in New York State are affiliated with hospitals, medical schools or other not-for-profit organizations. The Department is aware of two retailers and one manufacturer of educational specimens which are licensed as nontransplant anatomic banks that would fall within the definition of a small business.

Five nontransplant anatomic banks are owned by or operate in local government-owned facilities, including two county mortuaries, one medical examiner's office, and health professional programs at two community colleges.

Compliance Requirements

These amendments refine the definition of nontransplant anatomic bank to eliminate any regulatory confusion, decrease the likelihood of misinterpretation by regulated parties, and clarify licensure requirements for nontransplant anatomic banks located outside New York State. Licensure requirements are detailed for entities that use whole bodies and body segments in medical research and/or health professional education. Minimum personnel, facilities, and record keeping standards are established for recovery, processing, storage and distribution of whole bodies and body segments. The proposed regulations include the following provisions:

- The terms body segment, whole body, whole body acquisition service, and whole body user are defined.
- Ownership and control requirements are specified for whole body acquisition services located in-State and for those located out of State.
- Minimum staffing requirements for whole body acquisition services and whole body users are established.
- Facility requirements for whole body acquisition services, whole body users, and users of other nontransplant anatomic parts are set forth.
- Donor/next-of-kin informed consent requirements for all nontransplant anatomic banks are expanded to ensure that donor families are given the opportunity to limit a gift to specified identifiable body segments, organs, or tissues. Provisions for documenting consent obtained by telephone are added.
- Recordkeeping requirements specifically applicable to whole body acquisition services and whole body users are included to supplement existing requirements for all nontransplant anatomic banks found in Section 52-2.9(i).
- Disposition and transfer requirements for whole bodies, body segments and other nontransplant anatomic parts are described.
- Safety requirements applicable to all nontransplant anatomic banks are detailed.
- A requirement for reporting nontransplant anatomic banking activities to the Department is specified.

Professional Services

Regulated parties are not likely to need additional professional services to comply with these regulations.

Compliance Costs

Currently, staff members of all New York State medical schools that would be whole body acquisition services, meet all stipulated educational requirements. If a whole body acquisition service does not meet this proposal's staffing requirements, it may incur expenses associated with employing: (1) a nontransplant anatomic bank director who holds a graduate degree in anatomy or the health sciences; and (2) an appropriately trained morgue attendant, diener, or licensed funeral director responsible for preparation, care and maintenance of whole bodies and body segments.

Full-time salaries for properly trained morgue attendants or dieners range from \$24,000 to \$46,200. Salaries for a director with the appropriate graduate degree would depend upon whether the director is full-time or part-time and other responsibilities within the institution. Full-time salaries for occupations requiring similar credentials range from \$38,000 to \$101,390. (See NYS Education Department website workforce wages.)

A whole body user may incur expenses associated with recruiting a staff member with a graduate degree in the health sciences, and training in human dissection or in the activity to be performed. Based upon information submitted in the application process, nontransplant anatomic banks currently licensed to use whole bodies and body segments in research and/or education are already likely to employ such an individual.

A whole body acquisition service not already in compliance with the proposal's new facilities requirements could incur additional expenses, as follows:

(1) a working sink and adequate counter space for preparation of whole bodies and body segments (costs range from \$5,000 to more than \$10,000, depending on size and specifications);

(2) counters, tables, and cabinetry made of material easily disinfected and cleaned (modular-unit base cabinets cost from \$800 to \$1,400 each);

(3) a refrigerated storage room dedicated solely to storage of whole bodies or body segments, with lockable access doors and alarms to signal intrusion or unacceptable temperature deviation (cost varies depending on size and type, e.g., four-body crypt versus walk-in, or portable versus fixed-room, but ranges from \$12,000 to \$140,000);

(4) a U.S. Occupational Safety and Health Administration (OSHA)-approved device for handling, lifting and internal transportation of whole bodies or body segments (a cadaver lift assembly costs approximately \$4,000); and

(5) an OSHA-approved eye wash station (a fixed, plumbed station costs from \$300 to \$500).

A whole body user not already in compliance with the proposal's facilities requirements could incur additional expenses, as follows:

(1) a dedicated room with lockable access doors and isolation from public view to ensure safe and respectful handling of whole bodies and body segments (costs associated with providing locks and a means to obscure the public's view are minimal);

(2) dissection tables commercially designed for that purpose (commercial dissection tables cost \$2,800 for a standard table and \$4,400 for a hinged-hood table);

(3) a working sink and adequate counter space (costs range from \$5,000 to more than \$10,000, depending on size and specifications); and

(4) an OSHA-approved eye wash station (a fixed, plumbed station costs from \$300 to \$500).

Other nontransplant anatomic banks not already in compliance with the proposal's facilities requirements could incur additional expenses, as follows:

(1) a room of sufficient size and construction with lockable doors to restrict access to individuals directly associated with the education or research conducted, and ensure isolation from public view (costs associated with providing locks and a means to obscure the public's view are minimal); and

(2) a working sink and adequate counters constructed of nonporous materials (costs range from several hundred dollars to more than \$1,000, depending on size and specifications).

Unless otherwise stated, cost estimates provided above are based upon information generally available in medical and laboratory supply catalogs and cost estimates provided by medical schools that would be required to comply with these standards.

Nontransplant anatomic banks could incur some minimal additional costs to revise written procedures, and forms/logs for recording specific information to document the donation process, informed consent, and storage and disposition of nontransplant anatomic parts. It is not possible to provide an estimate of the costs of implementing this amendment's record keeping provisions, since costs would vary depending upon the volume of the nontransplant anatomic parts recovered and the amount of record keeping already in place. Most research and education facilities currently identify, track and dispose of nontransplant anatomic parts in a manner consistent with these requirements as part of good research techniques and inventory procedures. Moreover, it is expected that existing staff would be able to implement these requirements, thereby avoiding added labor costs.

The above-described costs would be easily offset by the benefits to be derived from assurance of safe, appropriate and respectful handling of

human bodies, body segments, organs, and tissues used in research and/or education.

All costs associated with modifying facilities to comply with the regulations would be one time costs. To the extent a bank does not currently comply with the staffing requirements, the labor costs noted above could be said to be the estimated annual cost of complying with this regulation.

Economic and Technological Feasibility

The proposed changes present no economic or technical difficulties to small businesses and local governments. Although some revisions to whole body recovery and processing facilities and record keeping practices are required, these requirements are straightforward and easily instituted by existing nontransplant anatomic bank staff.

Minimizing Adverse Impact

The proposed amendments would have no significant adverse impact on small businesses presently in compliance with established industry standards. The need to codify standards for appropriate handling of whole bodies and body segments outweighs any added costs some small businesses may incur to implement these changes fully. These amendments have been developed with an emphasis on minimizing burdens on regulated parties to the greatest extent possible, while maintaining adequate standards to ensure safe and respectful handling of whole bodies and body segments.

Small Business and Local Government Participation

The Department notified all regulated parties directly regarding the proposed regulation in order to solicit comments. Changes have been incorporated, as appropriate, based on comments and suggestions received as a result. No adverse comments were received from affected parties that are either government operated or small businesses.

More recently, the Department distributed copies of the modified proposal at the January 20, 2006 meeting of the Anatomical Committee of the Associated Medical Schools of New York State, and participated in discussion of specific changes made in response to informal comments. No adverse comments and no written comments were received as a result of this meeting.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas

The Department has identified three nontransplant anatomic banks located in rural New York State counties or towns with a population density of fewer than 150 persons per square mile: a chiropractic college, a university health professional education program, and a medical imaging equipment manufacturer. These facilities are all licensed by the Department as nontransplant anatomic banks. Two of these facilities are whole body users and would be subject to the facilities requirements imposed by the amended regulation. The medical imaging instrument manufacturer would be affected by the amendments minimally, since only human bone is used in its manufacturing process; this entity is not a whole body user according to the definition in the amendment.

Reporting, Recordkeeping and other Compliance Requirements; and Professional Services

These amendments refine the definition of nontransplant anatomic bank to eliminate any regulatory confusion, decrease the likelihood of misinterpretation by regulated parties, and clarify licensure requirements for nontransplant anatomic banks located outside New York State. Licensure requirements are detailed for entities that use whole bodies and body segments in medical research and/or health professional education. Minimum personnel, facilities, and record keeping standards are established for recovery, processing, storage and distribution of whole bodies and body segments. The proposed regulations include the following provisions:

The terms body segment, whole body, whole body acquisition service, and whole body user are defined.

- Ownership and control requirements are specified for whole body acquisition services located in-State and for those located out of State.
- Minimum staffing requirements for whole body acquisition services and whole body users are established.
- Facility requirements for whole body acquisition services, whole body users, and users of other nontransplant anatomic parts are set forth.
- Donor/next-of-kin informed consent requirements for all nontransplant anatomic banks are expanded to ensure that donor families are given the opportunity to limit a gift to specified identifiable body segments, organs, or tissues. Provisions for documenting consent obtained by telephone are added.

- Recordkeeping requirements specifically applicable to whole body acquisition services and whole body users are included to supplement existing requirements for all nontransplant anatomic banks found in Section 52-2.9(i).
- Disposition and transfer requirements for whole bodies, body segments and other nontransplant anatomic parts are described.
- A requirement for reporting nontransplant anatomic banking activities to the Department is specified.

Costs

Currently, staff members of all New York State medical schools that would be whole body acquisition services, meet all stipulated educational requirements. If a whole body acquisition service does not meet this proposal's staffing requirements, it may incur expenses associated with employing: (1) a nontransplant anatomic bank director who holds a graduate degree in anatomy or the health sciences; and (2) an appropriately trained morgue attendant, diener, or licensed funeral director responsible for preparation, care and maintenance of whole bodies and body segments. Full-time salaries for properly trained morgue attendants or dieners range from \$24,000 to \$46,200. Salaries for a director with the appropriate graduate degree would depend upon whether the director is full-time or part-time and other responsibilities within the institution. Full-time salaries for occupations requiring similar credentials range from \$38,000 to \$101,390. (See NYS Education Department website workforce wages.)

A whole body user may incur expenses associated with recruiting a staff member with a graduate degree in the health sciences, and training in human dissection or in the activity to be performed. Based upon information submitted in the application process, nontransplant anatomic banks currently licensed to use whole bodies and body segments in research and/or education are already likely to employ such an individual.

A whole body acquisition service not already in compliance with the proposal's new facilities requirements could incur additional expenses, as follows:

- (1) a working sink and adequate counter space for preparation of whole bodies and body segments (costs range from \$5,000 to more than \$10,000, depending on size and specifications);
- (2) counters, tables, and cabinetry made of material easily disinfected and cleaned (modular-unit base cabinets cost from \$800 to \$1,400 each);
- (3) a refrigerated storage room dedicated solely to storage of whole bodies or body segments, with lockable access doors and alarms to signal intrusion or unacceptable temperature deviation (cost varies depending on size and type, e.g., four-body crypt versus walk-in, or portable versus fixed-room, but ranges from \$12,000 to \$140,000);
- (4) a U.S. Occupational Safety and Health Administration (OSHA)-approved device for handling, lifting and internal transportation of whole bodies or body segments (a cadaver lift assembly costs approximately \$4,000); and
- (5) an OSHA-approved eye wash station (a fixed, plumbed station costs from \$300 to \$500).

A whole body user not already in compliance with the proposal's facilities requirements could incur additional expenses, as follows:

- (1) a dedicated room with lockable access doors and isolation from public view to ensure safe and respectful handling of whole bodies and body segments (costs associated with providing locks and a means to obscure the public's view are minimal);
- (2) dissection tables commercially designed for that purpose (commercial dissection tables cost \$2,800 for a standard table and \$4,400 for a hinged-hood table);
- (3) a working sink and adequate counter space (costs range from \$5,000 to more than \$10,000, depending on size and specifications); and
- (4) an OSHA-approved eye wash station (a fixed, plumbed station costs from \$300 to \$500).

Other nontransplant anatomic banks not already in compliance with the proposal's facilities requirements could incur additional expenses, as follows:

- (1) a room of sufficient size and construction with lockable doors to restrict access to individuals directly associated with the education or research conducted, and ensure isolation from public view (costs associated with providing locks and a means to obscure the public's view are minimal); and
- (2) a working sink and adequate counters constructed of nonporous materials (costs range from several hundred dollars to more than \$1,000, depending on size and specifications).

Unless otherwise stated, cost estimates provided above are based upon information generally available in medical and laboratory supply catalogs

and cost estimates provided by medical schools that would be required to comply with these standards.

Nontransplant anatomic banks could incur some minimal additional costs to revise written procedures, and forms/logs for recording specific information to document the donation process, informed consent, and storage and disposition of nontransplant anatomic parts. It is not possible to provide an estimate of the costs of implementing this amendment's record keeping provisions, since costs would vary depending upon the volume of the nontransplant anatomic parts recovered and the amount of record keeping already in place. Most research and education facilities currently identify, track and dispose of nontransplant anatomic parts in a manner consistent with these requirements as part of good research techniques and inventory procedures. Moreover, it is expected that existing staff would be able to implement these requirements, thereby avoiding added labor costs.

The above-described costs would be easily offset by the benefits to be derived from assurance of safe, appropriate and respectful handling of human bodies, body segments, organs, and tissues used in research and/or education.

Minimizing Adverse Impact

The proposed amendments would have no significant adverse impact on rural facilities presently in compliance with established industry standards. The need to codify standards for appropriate handling of whole bodies and body segments outweighs any added costs some facilities located in rural areas may incur in implementing these changes fully. These amendments have been developed with an emphasis on minimizing burdens on regulated parties to the greatest extent possible, while maintaining adequate standards to ensure safe and respectful handling of whole bodies and body segments.

Rural Area Participation

The Department notified all regulated parties directly regarding the proposed regulation in order to solicit comments. Changes have been incorporated, as appropriate, based on comments and suggestions received as a result. No adverse comments were received from affected parties that operate a tissue bank in an area designated as rural.

More recently, the Department distributed copies of the modified proposal at the January 20, 2006 meeting of the Anatomical Committee of the Associated Medical Schools of New York State, and participated in discussion of specific changes made in response to informal comments. No adverse comments and no written comments were received as a result of this meeting.

Job Impact Statement

A Job Impact Statement is not attached, because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Language Assistance and Patient Rights

I.D. No. HLT-20-06-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of sections 405.7 and 751.9 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

Subject: Language assistance and patient rights.

Purpose: To strengthen communications provisions for persons who do not speak English or do not speak it well; and add two rights to the Patient's Bill of Rights to be consistent with the Public Health Law.

Text of proposed rule: Paragraph (7) of subdivision (a) is repealed in its entirety and a new paragraph (7) of Section 405.7 is added to read as follows:

(7) *the hospital shall develop a Language Assistance Program to ensure meaningful access to the hospital's services and reasonable accommodation for all patients who require language assistance. Program requirements shall include:*

(i) *the designation of a Language Assistance Coordinator who shall report to the hospital administration and who shall provide oversight for the provision of language assistance services;*

(ii) *policies and procedures that assure timely identification and ongoing access for patients in need of language assistance services;*

(iii) the development of materials that will be made available for patients and potential patients that summarize the process and method to access free language assistance services;

(iv) ongoing education and training for administrative, clinical and other employees with direct patient care contact regarding the importance of culturally and linguistically competent service delivery and how to access the hospital's language assistance services on behalf of patients;

(v) signage, as designated by the Department of Health, regarding the availability of free language assistance services in public entry locations and other public locations;

(vi) identification of language of preference and language needs of each patient upon initial visit to the hospital;

(vii) documentation in the medical record of the patient's language of preference, language needs, and the acceptance or refusal of language assistance services;

(viii) a provision that family members, friends, or non-hospital personnel may not act as interpreters, unless:

(a) the patient agrees to their use;

(b) free interpreter services have been offered by the hospital and refused; and

(c) in the event the family members, friends, or non-hospital personnel are younger than 16 years of age; issues of competency, confidentiality or conflicts of interest are taken into account. The use of individuals younger than 16 years of age should be used only in emergent circumstances and their use documented in the medical record;

(ix) management of a resource of skilled limited English proficiency interpreters and/or persons skilled in communicating with vision and hearing impaired individuals;

(a) limited English proficiency interpreters and persons skilled in communicating with vision and/or hearing impaired individuals shall be available to patients in the inpatient and outpatient setting within 20 minutes and to patients in the emergency service within 10 minutes of a request to the hospital administration by the patient, the patient's family or representative or the provider of medical care. The Commissioner of Health may approve time limited alternatives to the provisions of this subparagraph regarding limited English proficiency interpreters and persons skilled in communicating with vision and/or hearing impaired individuals for patients of rural hospitals; which:

(1) demonstrate that they have taken and are continuing to take all reasonable steps to fulfill these requirements but are not able to fulfill such requirements immediately for reasons beyond the hospital's control; and

(2) have developed and implemented effective interim plans addressing the communications needs of individuals in the hospital service area.

(x) an annual needs assessment utilizing demographic information available from the United State Bureau of the Census, hospital administrative data, school system, data, or other sources, that will identify limited English speaking groups comprising more than one percent of the total hospital service area population. Translations/transcriptions of significant hospital forms and instructions shall be regularly available for the languages identified by the needs assessment; and

(xi) reasonable accommodation for a family member or patient's representative to be present to assist with the communication assistance needs for patients with mental and developmental disabilities.

New paragraphs (18) and (19) are added to subdivision (c) of Section 405.7 to read as follows:

(18) Authorize those family members and other adults who will be given priority to visit consistent with your ability to receive visitors.

(19) Make known your wishes in regard to anatomical gifts. You may document your wishes in your health care proxy or on a donor card, available from the hospital.

Subdivisions (n) and (o) are amended and new subdivisions (p) and (q) are added to Section 751.9 to read as follows:

(n) approve or refuse the release or disclosure of the contents of his/her medical record to any health-care practitioner and/or health care facility except as required by law or third-party payment contract; [and]

(o) access his/her medical record pursuant to the provisions of section 18 of the Public Health Law, and Subpart 50-3 of this Title[.];

(p) authorize those family members and other adults who will be given priority to visit consistent with your ability to receive visitors; and

(q) make known your wishes in regard to anatomical gifts. You may document your wishes in your health care proxy or on a donor card, available from the center.

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqa@health.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of this regulation is contained in Public Health Law (PHL) Sections 2803 and 2805-r. PHL Section 2803 outlines the powers and duties of the Commissioner. It also authorizes the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities. PHL Section 2805-r specifically authorizes the promulgation of regulations in relation to the right of patients who are unable to speak to have certain people present at all times during their stay at a hospital.

Legislative Objectives:

The legislative objective of PHL Article 28 includes the protection of the health of the residents of the State by assuring the efficient provision and proper utilization of health services, of the highest quality at a reasonable cost.

Needs and Benefits:

Provision of quality health care to individuals who have difficulty with the English language or are hearing and/or vision impaired is a major problem as clinicians are often unable to obtain information to make accurate diagnoses and because patients often do not understand the treatment regimens prescribed for them. Language barriers make it difficult to obtain information about medical services, to make appointments, understand how to obtain medical insurance and navigate the health care system in general. Non-English speaking patients are less likely to use preventive and primary care services and poor communication due to language difficulties deters individuals from receiving timely treatment and can result in increased costs and inefficiencies overall.

The number of languages spoken in the United States is increasing significantly. Approximately 11 million people, (4.2% of the U.S. population) do not speak English, or do not speak it well, while over 21 million people (8.1% of the U.S. population) speak English less than very well. Almost two-thirds of New York City's residents are immigrants. These immigrants and their children come from over 200 different countries and speak more than 140 languages. While the majority of these individuals are in New York City, other areas of the State are impacted as well.

To address the increased need for language services in the hospital setting, the Department is strengthening its regulation regarding communication services. This proposal will require hospitals to develop a Language Assistance Program to ensure meaningful access to the hospital's services and reasonable accommodation for all patients who require language assistance. They are minimum standards that all hospitals are required to provide. More services could be provided if a hospital chooses to do so.

This proposal also makes technical amendments to the hospital and diagnostic and treatment center patients' rights provisions to include two rights that are in statute and in the Department's Your Rights as a Hospital Patient booklet, but were never added to the regulation.

COSTS:

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

The new provisions of Section 405.7 should not increase costs for the regulated entities with the exception of the development of guidance materials that will summarize available language programs and how patients can access this free service. Many hospitals may already have such materials in place. The current provisions in Section 405.7 already require hospitals to manage a resource of skilled interpreters and persons skilled in communicating with vision and/or hearing impaired individuals. They also require hospitals to provide translations/transcriptions of significant hospital forms, instructions and information in order to provide effective visual, oral and written communication with all persons receiving treatment in the hospital.

The new provisions will require regulated entities to designate a Language Assistance Coordinator to provide oversight for the provision of language assistance services. Such coordinator may be designated from within the current hospital staff. Regulated entities will need to provide training, manage skilled limited English proficiency interpreters and/or

persons skilled in communicating with vision and hearing impaired individuals in a timely manner. Again they may designate such individuals from within current hospital staff or current volunteers.

Regulated entities must also develop an annual needs assessment that will identify limited English speaking groups comprising more than one percent of the total hospital service area population. They must also make readily available for languages identified by the needs assessment, translations/transcriptions of significant hospital forms and instructions. Hospitals are already required to do this.

Costs to Local and State Government:

Municipally owned hospitals will be required to adhere to these regulations the same as all other regulated entities. They are not expected to incur any increased costs other than for the development of the same guidance materials as noted above.

Costs to the Department of Health:

This proposal requires the Department to designate signage for use by the hospitals regarding the availability of free language assistance services in key entry locations and other public locations. While this can be done utilizing existing staff, some costs will be incurred for translation of standard signs for all languages utilized by New York State residents.

The Department currently has a translating and interpreting services contract to provide language assistance services on a needed basis. The current contract has a translation of documents cost ranging from \$.22/word to \$.35/word depending on the contract vendor and the language being translated. For the Your Rights as a Hospital Patient booklet it would cost between \$3,214.20 and \$5,113.50. This booklet already exists in Spanish and can be found on the Department's website at www.health.state.ny.us. The current contract costs between \$1.98 - \$2.00/minute for over the phone interpreters.

Local Government Mandates:

None.

Paperwork:

Program requirements required by hospitals will include the development of materials that will be made available for the patients and potential patients that summarize the process and method to access free language assistance services. Such requirements will also require documentation in the medical record of the patient's language of preference, language needs and the acceptance or refusal of language assistance service.

Duplication:

Title VI of the Civil Rights Act prohibits discrimination that has been interpreted by the federal government to include protection of minorities who do not speak English or speak it well. Recipients of federal funding must take reasonable steps to ensure that people with limited English proficiency have meaningful access to their programs and services. This provision parallels the Civil Rights Act. Title VI is a law that is general in nature with respect to discrimination. This regulation contains specific requirements with respect to hospital Language Assistance Programs. It will not conflict with or duplicate the federal statute.

Alternative Approaches:

The current regulation could be left in place, however it is not as comprehensive as the new provisions. Current provisions have not always resulted in the Department's assurance that all patients have meaningful access to hospital services for all patients who require language assistance.

Federal Requirements:

Title VI of the Civil Rights Act prohibits discrimination. Its purpose is to ensure that federal money is not used to support health care providers who discriminate on the basis of race, color, or national origin. The federal Department of Health and Human Services (HHS) and the courts have applied this statute to protect minorities who do not speak English well. This provision parallels the Civil Rights Act. Title VI is a law that is general in nature with respect to discrimination. This regulation contains specific requirements with respect to hospital Language Assistance Programs. It will not conflict with or duplicate the federal statute.

Compliance Schedule:

This regulation will take effect upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

Section 405.7 of 10 NYCRR provisions of this regulation will apply to general hospitals; of which 5 are small businesses, (defined as 100 employees or less). Section 751.9 provisions will apply to diagnostic and treatment centers; 237 are considered small businesses.

Compliance Requirements:

In order to comply with the Section 405.7 requirements, hospitals must develop a Language Assistance Program that will reasonably accommo-

date the needs of all patients who require language assistance. The Section 751.9 requirements do not impose any additional compliance requirements. They simply put into regulation two patients' rights provisions that are in the Public Health Law and in the Department's Your Rights as a Hospital Patient booklet.

Professional Services:

Hospitals will be required to designate a Language Assistance Coordinator and provide ongoing training and education for administrative, clinical and direct patient care staff in culturally and linguistically competent service delivery. This can be done from existing staff.

Compliance Costs:

Compliance can be done with existing staff therefore the compliance costs should be none with the possible exception of those hospitals that have not identified the availability of languages in printed materials.

Economic and Technological Feasibility:

It should be economically and technologically feasible for small businesses to comply with these regulations. There should be no increased costs to implement this regulation with the possible exception of those hospitals that have not identified the availability of languages in printed materials. Existing staff can be utilized.

Minimizing Adverse Impact:

These provisions authorize the Commissioner to approve time limited alternatives regarding limited English proficiency interpreters and persons skilled in communicating with vision/and or hearing impaired individuals of rural hospitals which: (1) demonstrate that they are taking all reasonable steps to fulfill these requirements; and (2) have developed and implemented effective interim plans addressing the communications needs of individuals in the hospital service area.

Small Business and Local Government Participation:

Outreach to the affected parties, is being conducted. Organizations who represent the affected parties are given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council. The public, including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

During the September 22, 2005 Codes and Regulations Committee meeting several speakers from the Immigrant Health Care Access and Advocacy Collaborative, comprised of associations serving those in need of language assistance, as well as the Greater New York Hospital Association, spoke in favor of the proposal and urged its passage. There were extensive discussions with these groups as well as with the Health Care Association of New York State who worked together to develop regulations that would provide quality health care to hospital patients with limited English proficiency or disabilities.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas

The proposed amendment will apply Statewide, including the 43 rural counties with less than 200,000 inhabitants, and the 10 urban counties with a population density of 150 per square mile or less. There are 51 rural hospitals in New York State.

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services

Hospitals, including rural hospitals, will be required to develop Language Assistance Programs that will reasonably accommodate the needs of all patients who require language assistance. They will also be required to designate a Language Assistance Coordinator and provide ongoing training and education for administrative, clinical and direct patient care staff in culturally and linguistically competent service delivery. This can be done from existing staff. Guidance materials will need to be developed that will summarize available language programs and how patients can access this free service. Many hospitals may already have such materials in place. An annual needs assessment must be developed that will identify limited English speaking comprising more than one percent of the total hospital service area population. They must also make readily available for languages identified by the needs assessment, translations/transcriptions of significant hospital forms and instructions. Hospitals are already required to do this. Documentation in the medical record of the patient's language of preference, language needs and the acceptance or refusal of language assistance service will also be required.

Costs

These provisions should not increase costs for the regulated entities with the exception of the development of guidance materials that will summarize available language programs and how patients access this free service. Many hospitals may already have such materials in place.

Minimizing Adverse Impact

These provisions authorize the Commissioner to approve time limited alternatives regarding limited English proficiency interpreters and persons skilled in communicating with vision and/or hearing impaired individuals of rural hospitals which: (1) demonstrate that they are taking all reasonable steps to fulfill these requirements; and (2) have developed and implemented effective interim plans addressing the communications needs of individuals in the hospital service area.

Rural Area Participation

Outreach to the affected parties, including those in rural areas is being conducted. Organizations who represent the affected parties have been given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council. The public, including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

Job Impact Statement

A Job Impact is not included because these provisions will not have a substantial adverse impact on jobs and employment activities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Cytotechnologists Work Standard

I.D. No. HLT-20-06-00005-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of section 58-1.12(b)(7) of Title 10 NYCRR.

Statutory authority: Public Health Law, section 576-a

Subject: Cytotechnologists work standard.

Purpose: To provide flexibility to the department is establishing work standards that consider new technologies for pap smear screening.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by Section 576-a of the Public Health Law, existing paragraph (7) of Section 58-1.12(b) of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) is amended, and new subparagraph (iv) is added, to be effective upon publication of a Notice of Adoption in the State Register, as follows:

58-1.12(b)(7) Exceptions. (i) Each laboratory [must]shall evaluate the performance of each cytotechnologist *in its employ*, and establish an appropriate examination volume limitation based on *the cytotechnologist's* experience, documented accuracy[,] and performance in proficiency testing, or [for]on other reasons, including false-negative or false-positive interpretations [reports]. Under no circumstances [should]shall this volume be exceeded, even if it is [less]lower than the maximum work standard.

(ii) A cytotechnologist may exceed the work standard by [10]twenty (20) percent, with the written approval of the department. The laboratory director may request such approval based on each cytotechnologist's experience, documented accuracy, including false-negative or false-positive [reports]interpretations, and a performance score in proficiency testing of not more than two (2) errors. Documentation of [this]department approval [must]shall be available in the laboratory, and may be revoked by the department with prior notice to the laboratory, based on a cytotechnologist's performance in proficiency testing or other evidence that the cytotechnologist's accuracy is [less]other than acceptable. The laboratory director [must]shall monitor the performance of each cytotechnologist and advise the department [when the]whenever the approval is to be revoked based on on-the-job performance.

(iii) Cytotechnologists who qualify as supervisors under section 58-1.4 of this Subpart may re-examine up to [20] twenty (20) slides per day [separate from]in addition to the workload standard, provided the combined total number of slides does not exceed one-hundred (100), as part of the [quality control-]quality assurance program of the laboratory, with the prior approval of the department, based on documented accuracy, including [false negative or positive reports]false-negative and false-positive interpretations, and performance in proficiency testing. Such approval may be revoked, with prior notice to the laboratory, based on proficiency testing performance or other evidence that the cytotechnologist's accuracy is [less]other than acceptable. Records [must]shall be maintained to document the examination volume and hours worked by each cytotechnologist.

(iv) The department may increase the cytotechnologist work standard beyond the level already authorized elsewhere in this section for cytotechnologists using a federal Food and Drug Administration (FDA)-approved device in the preparation or examination of cytology slides:

(a) in determining whether to increase the cytotechnologist work standard with respect to a particular device, the department shall consider the following: the FDA's approved use of the device; studies of the accuracy, reliability and appropriate use of the device; input from clinical laboratories using the device; recommendations of experts in the field of cytology and/or cytotechnology; and other relevant information as appropriate;

(b) (1) the department may require a clinical laboratory wishing to exceed the cytotechnologist work standard set forth elsewhere in this section to request in writing the department's approval. The department may also require the applicant laboratory to provide, in a form acceptable to the department, some or all of the following information regarding the device in use at the laboratory: the device manufacturer's recommendations, if any, regarding the quantity (i.e., slide volume), speed or manner of slide examination, and the basis for such recommendations; documentation of training for each cytotechnologist using the device; each cytotechnologist's experience using the device, including false-negative and false-positive interpretations, workload, and number of hours spent examining slides; each cytotechnologist's performance on proficiency testing; as well as any other information as determined appropriate by the department to assess device capacity and user capability; and

(2) the department shall provide written notice of the authorized work standard established pursuant to this subparagraph. The department may set a work standard in writing that applies to one or more cytotechnologists.

(c) laboratories shall maintain documentation of approval pursuant to this subparagraph for a minimum of two (2) years after use of the device is discontinued;

(d) if the department determines that a cytotechnologist work standard authorized pursuant to this subparagraph increases the rate of errors or compromises the reliability of results, the department shall adjust the standard as it deems appropriate and shall notify the affected clinical laboratories in writing of such change. Clinical laboratories that find the adjustment unacceptable may request only in writing that the department reconsider its determination; and

(e) notwithstanding the foregoing, any cytotechnologist work standard authorized by the department pursuant to this subparagraph shall be at least as stringent as the federal standards promulgated under the federal clinical laboratory improvement amendments of nineteen hundred and eighty-eight (1988) and/or other applicable law(s).

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqa@health.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

Statutory Authority:

Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The statute established standards for cytotechnologists' workload, a registration requirement for individuals engaged in initial examination of slides, and quality standards for preparing and examining the slides. Regulations adopted as 10 N.Y.C.R.R. Sections 58-1.12 and 58-1.13 pursuant to that legislation have been in effect since 1989. Public Health Law, Article 5, Title V was amended by Chapter 436 of the Laws of 1993. Section 576-a of that legislation modified the state's cytotechnologist work standard, (i.e., a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist may examine during a work day) to effect parity with federal standards in the Clinical Laboratory Improvement Amendments of 1988 (CLIA '88). Section 576-a also includes a provision authorizing the Department to increase the cytotechnologist work standard in response to technological advances in instrumentation and devices for assisted examination of cytology slides.

Legislative Objectives:

In 1988, media reports made the public aware of problems associated with inordinate cytotechnologist workloads in clinical laboratories examining gynecologic slides (Pap smears) for evidence of cervical cancer. At that time, New York was the only state with a comprehensive program of oversight of these laboratories, including review of cytotechnologist qualifications, and on-site assessment of laboratory operations and proficiency testing. While excessive testing volumes had not been reported in New York State, the Legislature determined that additional steps were required to protect women residents of the State, and Public Health Law Section

576-a was enacted as Chapter 539 of the Laws of 1988. The legislation established a work standard for initial examination of cytologic specimens (i.e., a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist or pathologist may examine during a work day), a registration requirement for individuals engaged in slide examination, and quality standards for the slides. Chapter 436 of the Laws of 1993 modified the State's cytotechnologist work standard for parity with federal standards in CLIA '88; specifically, the Legislature enacted an increase of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day, from the previous limit of 10 percent above the 80-slide limit, or 88 slides.

Needs and Benefits:

After initial enactment of Section 576-a, the Department adopted the first regulations in the country establishing cytotechnologist workload standards, a registration process for cytotechnologists, requirements for the quality of slides, as well as general standards for operation of cytopathology laboratories. The Department has not revised these regulations since their promulgation in 1990. During that time, the Department has gained significant experience in applying workload standards for 285 clinical laboratories with a permit in the cytology testing category that employ more than 1,200 registered cytotechnologists full-time and part-time.

The Food and Drug Administration (FDA) has approved for marketing a cytology slide screening device that increases the number of slides a cytotechnologist can accurately and reliably examine per day. The Department needs to consider, on a case by case basis and in the most expeditious manner possible, establishment of a cytotechnologist workload limit other than that set earlier to promote accurate and reliable slide examination by the conventional (manual) method. The Department must now ensure that New York residents and laboratories benefit from new technologies with the potential to improve gynecological cytology test methods without adding significantly to health care costs. To this end, it is proposed to amend existing regulations, and allow needed flexibility for increasing the workload limit for cytotechnologists using automated slide preparation and/or examination methods as new methods are approved by the FDA and become available for use by clinical laboratories.

Technological advances have permitted automation to make inroads in the discipline of cytology, a field of laboratory medicine that historically has relied solely on the joint expertise of cytotechnologists and pathologists for accurate and reliable diagnosis of cancers and other abnormalities detectable at the cellular level. Slides for cervical cancer screening, once prepared in the physician's office, can now be produced in the laboratory as a clean preparation of target cells, free of any obscuring blood or inflammation debris, deposited on a glass slide in a single layer, well-separated and with little or no overlap of cells to interfere with a cytotechnologist's ability to locate and identify aberrant cell types indicative of cervical cancer and other abnormalities. The FDA's approval of several automated systems for cytology slide preparation (i.e., fix-and-stain material on microscopic slides) as in-vitro diagnostic devices, and overwhelming acceptance of the devices by the clinical laboratory industry and women's health practitioners and advocates have opened the door to further advances in the science of cytology, specifically, development of computerized algorithms for detection of cells not meeting criteria as normal. The purported advantage of this new technology is that it allows cytotechnologists to focus on accurate interpretation, resulting not only in increased productivity but, more importantly, the potential to improve diagnostic performance.

During conventional (manual) slide examination, the cytotechnologist must use locator skills to detect cells that are abnormal according to pre-established criteria for nuclear density and other factors, such as the relative size of the cell nucleus compared to the rest of the cell. Several device manufacturers have programmed a computer with an algorithm similar to that used by cytotechnologists to identify abnormal cells, thereby allowing a computer to take over the tiresome task of scanning numerous slides to look for the usually rare abnormal cell. The algorithms are sophisticated, but, as yet, are not capable of definitively classifying cells as pre-cancerous or indicative of malignancy. Devices that locate and mark suspect cells, guiding the cytotechnologist to them for interpretation, have already received FDA approval. Another device approved by the FDA classifies as within normal limits slides with no to very low probability of an abnormal finding, allowing up to 25 percent of gynecologic specimens to be reported as within normal limits without human review.

New slide preparation and screening technologies are changing the way laboratories diagnose cervical cancer and other malignant diseases detectable at the cellular level. Clinical trial data and preliminary data from laboratories using location guidance devices for detection of cancerous

cells may increase by 50 percent or more the number of slides a cytotechnologist may reliably examine during a given time period. More importantly, evidence is emerging that this technology can increase the probability that no truly abnormal cell, however rare, would be missed due to human factors, such as fatigue and momentary lapses in vigilance, which have been widely recognized as capable of compromising result reliability. Manufacturers' claims that this technology can better locate cells typical of low- and high-grade squamous intraepithelial lesions (LSIL and HSIL, respectively), the most clinically important findings other than squamous cell carcinoma, are of particular interest to the Department in fulfilling its mandate to promote and protect the public health, because such claims, if proved correct, signal the potential to reduce morbidity in women who are routinely screened for cervical cancer.

Moreover, the Department has been informed that laboratories are reluctant to purchase automated devices for cytology examinations if the instrumentation cannot be utilized to near-full potential or in an otherwise cost-effective manner. This proposed rulemaking to increase the workload limit would better enable laboratories to acquire new technologies that hold promise for more efficient and effective cervical cancer diagnosis without compromising safety, accuracy and reliability.

In addition to allowing flexibility to change cytology workload standards without repetitive rulemaking, the proposed regulation would also provide affected parties with Department criteria for setting such standards, and make clear that, at the Department's discretion, laboratories may be required to request and be granted device-specific approval to examine Pap smears applying a workload standard other than that in place for conventional (manual) examination methods. Moreover, the proposed amendment establishes the Department's authority to make an immediate adjustment to any work standard pursuant to the rule upon a determination that error rates have increased or the reliability of results has been compromised following approval of an increased work standard.

The proposed amendment would also make the regulation consistent with its authorizing statute as modified by Chapter 436 of the Laws of 1993, which provided for an increase in the work standard of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day. Existing regulation must be changed, as it set the previous restriction as 10 percent above the 80-slide limit, or 88 slides, and, as such, does not accurately reflect the Department's practice of authorizing up to 96 slides to be examined per work day.

Several housekeeping modifications were also proposed to facilitate compliance. The Department has received numerous inquiries related to the allowance for cytotechnologists' qualified supervisors to examine up to 20 slides beyond the work standard, and finds it necessary to clarify that the combined total number of slides may not exceed 100. In three instances, the term "reports" has been changed to "interpretations" to make clear that the Department considers all errors as relevant to approval (i.e., false-negatives and false-positives), including errors in the cytotechnologist's interpretation, regardless whether corrected during re-examination or slide review by a pathologist prior to reporting - and not only erroneous results (typically false-negatives) reported to medical practitioners and discovered through retrospective review following a finding of HSIL or an equivalent, or malignancy.

Costs:

Costs to private regulated parties:

Since the proposed rulemaking does not require purchase or use of any devices for preparation and/or examination of cytology slides, this proposed rulemaking does not require private affect parties to incur costs. To the contrary, several clinical laboratories operating in New York State and using or considering use of new technology for examination of slides, have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that specimen throughput may be increased, which, in turn, would allow for increased reimbursement for cytopathology services and potentially increased profits.

Costs for implementation and administration of the rule:

Costs to State government:

State government is not expected to incur costs attributable to this proposed amendment.

Costs to the Department:

The Department is not expected to incur costs attributable to this proposed amendment. A system is already in place for review of laboratories' requests for qualified cytotechnologists to exceed the existing workload limit by 20 percent, and it is expected that the few additional requests submitted as a direct result of this amendment would be able to be processed under the same system and using the same personnel.

Costs to local government:

Local government-operated clinical laboratories would have the opportunity to increase reimbursement and profits by increasing throughput of cytology examination specimens under the provisions of this proposal, as described for private regulated parties.

Paperwork:

The Department may experience a minimal increase in paperwork from the intermittent need to communicate new standards to affected laboratories in writing. The Department already has an established system for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and expects few additional requests as a direct result of this amendment.

Local Government Mandates:

The proposed regulation imposes no new mandates on any county, city, town or village government; or school, fire or other special district.

Duplication:

These rules do not duplicate any other law, rule or regulation.

Alternative Approaches:

In drafting this proposed rule, the Department has considered the diversity of technological approaches to automating Pap smear examinations already in place and those known to be in development. The only consistent feature of these devices appears to be generalization use of a computerized algorithm to simulate human decisionmaking. The Department believes it is not feasible to arrive at a single, universally applicable work standard that could be set forth in regulation for all existing and future Pap examination technologies. The alternative — promulgation of revised regulations to establish workload limits each time a device is granted FDA approval — would be unacceptably burdensome to the Department, and would possibly delay the use of technology in New York that could more effectively identify cancerous and precancerous cells.

Federal Standards:

Federal workload standards for cytotechnologists performing conventional (manual) examination of cytology slides have been promulgated under CLIA '88. Both the FDA and U.S. Centers for Medicaid and Medicare Services (CMS) have declined to set in federal regulation standards specific to any current commercial automated slide examination device. This proposed amendment contains a provision that any cytotechnologist work standard authorized by the Department pursuant to the amendment must be at least as stringent as the respective federal standards.

Compliance Schedule:

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, efficient and effective tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester-Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using automated devices, and there appears to be no potential for organized opposition. Regulated parties should be able to comply with these amendments as of their effective date.

Regulatory Flexibility Analysis**Effect on Small Businesses and Local Governments:**

This proposed amendment to allow needed flexibility to increase workload limits for cytotechnologists using automated slide preparation and/or examination methods would affect clinical laboratories operated as small businesses or by local government, provided such facilities hold or are seeking a permit in the category of cytology, and opt to use U.S. Food and Drug Administration (FDA)-approved devices for automated slide preparation and/or examination. Of the 253 clinical laboratories holding a Department permit in cytology, 44 have declared themselves to be small businesses in permit applications submitted to the Department, and local governments, including the City of New York, operate seven such laboratories.

Compliance Requirements:

The Department expects that affected clinical laboratories operated as small businesses or by local governments would experience minimal impact from this proposal's adoption. Most of these facilities engaged in the

examination of cytologic material, including Pap smears, do not process the high number or type of specimens that would make purchase and use of an automated device for slide examination a financially prudent decision. However, any laboratory that has purchased automated devices for preparation and/or examination of cytology slides would benefit from the flexibility this amendment would afford.

The Department has a system already established for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and anticipates few, if any, additional requests as a direct result of this amendment from laboratories operated as small businesses or by a local government. Therefore, the Department expects that this small segment of the affected regulated parties would be able to comply with these regulations as of their effective date.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

This rule making does not impose any additional costs on clinical laboratories operating as small businesses or by a local government since it does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State, and using or considering use of such devices have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing for increased reimbursement for cytopathology services and potentially increased profits. This potential benefit may also apply to any small business or local government laboratory operator opting to use automated devices for cytologic material examination.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses or local governments that operate clinical laboratories affected by this amendment. This proposal does not impose a requirement for purchase or use of new technologies, i.e., automated devices for cytologic material examination.

Minimizing Adverse Impact:

These amendments will not have an adverse impact on the ability of regulated parties that are small businesses or operated by local governments to comply with Department requirements for cytotechnologist work standards.

Small Business and Local Government Participation:

Notifying small businesses or local government affected parties about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would incur unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those operated as small businesses or by local government, are being notified of the provisions of this amendment, and, following its adoption, will be invited to provide comments and otherwise participate in the development of standards for workload limits.

Compliance Schedule:

The director of the Department's Wadsworth Center and his staff, including the director for Regulatory Affairs, held discussions with representatives of the Governor's Office, the Commissioner of Health's Office, firms that manufacture and/or distribute automated devices for cytological examinations, and regulated parties (i.e., clinical laboratories) currently using such devices. Various Department groups, including the Office of Medicaid Management and the Office of Managed Care, have been working together in an ongoing effort to ensure adequate reimbursement for cytological examinations, including Pap smears, using FDA-approved cytological screening devices.

This amendment does not impose any new or more stringent requirements on regulated clinical laboratories; rather, it affords flexibility to laboratories that handle medium- to high-volumes of cytology specimens, and wish to use automated devices to examine increased numbers of slides without compromising testing accuracy and reliability. Strong support for the amendment is expected from clinical laboratories holding or seeking a permit in the category of cytology, and patient advocacy organizations, especially those focused on women's health; indications of support have been expressed by the medical community at large, which has just begun to become educated in the availability and reliability of the new technologies for cytological examination. The Department will continue to work with interested and affected parties in carrying out this amendment's provisions, and will notify laboratories in an unequivocal and timely manner of

any changes affecting the cytotechnologists' workload standard or exceptions to that standard following adoption of this proposal.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technologies, and no potential of organized opposition is apparent. Consequently, regulated parties, including those operated as a small business or by local government, should be able to comply with these regulations as of their effective date.

Rural Area Flexibility Analysis

Effect of Rule:

Rural areas are defined as counties with a population under 200,000 and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas. Of the 253 clinical laboratories holding a permit in the category of cytology, 88, many of which are hospital-based, are located in rural areas.

Compliance Requirements:

The Department expects that affected clinical laboratories located in and serving rural areas will experience minimal impact by anticipated adoption of this proposal. With the possible exception of one or two large rural hospital pathology departments, most laboratories operated in rural areas and engaged in examination of cytologic material, including Pap smears, do not process the high volume and type of cytologic specimens that would make purchase and use of an automated device for slide examination a financially prudent decision. However, any laboratory that has purchased such automated devices will be able to take advantage of the flexibility this amendment would afford. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with this amendment as of its effective date.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

Clinical laboratories operating in rural areas are not required to incur additional costs as a result of this proposed amendment, since this rulemaking does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State and using or considering use of devices for the examination of slides have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing increased reimbursement for cytopathology services and potentially increased profits. This benefit may also apply to laboratories located in rural areas, especially larger hospital-based pathology laboratories opting to use automated devices for cytologic material examination.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas. This proposal does not impose a requirement for purchase or use of new technologies, i.e., devices for cytologic material examination.

Minimizing Adverse Impact:

These amendments will not have an adverse impact on the ability of regulated parties in rural areas to comply with Department requirements for cytotechnologist work standards.

Participation by Parties in Rural Areas:

This amendment is being proposed as an emergency rule. Notifying affected parties in rural areas about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would cause unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those located in rural areas, are being notified of this amendment's provisions, and, following its adoption, will be invited to provide comments and otherwise participate in development of standards for workload limits.

Compliance Schedule:

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, effective, and efficient tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive

Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester—Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technology, and no potential for organized opposition is apparent. Regulated parties, including those operating in rural areas, should be able to comply with these regulations as of their effective date.

Job Impact Statement

Nature of Impact:

This proposed rule making would have an impact on the productivity of cytotechnologists who use the new cytology slide preparation and examination technology. The proposed rule would authorize cytotechnologists using such technologies to increase, with Department approval, the number of slides that can be effectively reviewed in a given time period.

In addition, the proposed rule making would make it more financially attractive for clinical laboratories to acquire new cytology slide preparation and examination technology. Therefore, more cytotechnologists will use such technology. Experienced cytotechnologists will have to receive on the job training to use some of the new technologies, while persons studying to become cytotechnologists will learn to use the new technology as part of their course work. However, given workforce shortage of cytotechnologists nationally and in New York, the Department does not expect that the use of the new technologies will have an adverse impact on employment opportunities for cytotechnologists.

Category and Numbers Affected:

Cytotechnologists working in New York licensed clinical laboratories may be affected by this rule. There are approximately 1,100 registered cytotechnologists working (on a part time or full time basis) in New York licensed clinical laboratories. However, many of these cytotechnologists work in clinical laboratories that are not located in New York State. It is unclear how many cytotechnologists will use new technologies pursuant to this proposed rulemaking to review more slides than is currently permissible.

Regions of Impact:

Cytotechnologists work in laboratories throughout New York State. However, as described below, the Department of Health does not believe that this proposed rulemaking would have a significant adverse impact on employment opportunities for cytotechnologists.

Likelihood of Adverse Impact:

The Department expects that the proposed rulemaking, if implemented will increase cytotechnologists' productivity, it will not adversely affect job opportunities for cytotechnologists. There is currently a significant workforce shortage of cytotechnologists in the United States, including New York. This workforce shortage is expected to worsen in coming years as large numbers of cytotechnologists retire and relatively few are being trained to replace them. The federal Clinical Laboratory Advisory Committee, the US Department of Labor and several health care professional organizations have acknowledged this workforce shortage problem. Some clinical laboratories have urged the Department to promulgate this regulation to alleviate cytotechnologist-staffing shortages.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Reimbursement of Paid Medical Expenses

I.D. No. HLT-20-06-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of section 360-7.5(a) of Title 18 NYCRR.

Statutory authority: Public Health Law, section 206(1)(f); and Social Services Law, section 363-a

Subject: Reimbursement of paid medical expenses.

Purpose: To implement the Federal District Court orders in Greenstein and Carroll and the order of the Appellate Division, First Department in Seittelman.

Text of proposed rule: Subdivision (a) of section 360-7.5 is repealed and a new subdivision (a) is added to read as follows:

(a)(1) *Except as provided in paragraphs (2) through (4) of this subdivision, payment by the MA program for services covered under the program which are medically necessary in amount, duration, and scope,*

will be made to the enrolled MA provider which furnished the services, at the MA rate or fee in effect at the time the services were provided.

(2) Payment may be made to:

(i) a practitioner's employer if the practitioner would be required to do so as a condition of employment;

(ii) the facility in which such services were provided if the facility submits the claim under a contract between a practitioner and the facility; or

(iii) an organization, including a health maintenance organization, which furnishes health care through an organized health care delivery system, if there is a contract between the organization and the practitioner under which the organization bills or receives payment for the services.

(3)(i) Payment may be made to a recipient or the recipient's representative for paid medical bills if:

(a) an erroneous MA eligibility determination is reversed (whether the reversal is due to the social services district discovering its own error or is the result of a fair hearing decision or court order), or the social services district fails to determine MA eligibility within the time periods set forth in section 360-2.4 of this Part; and

(b) the erroneous eligibility determination or the delay in determining eligibility caused the recipient or the recipient's representative to pay for medically necessary services which otherwise would have been paid for by the MA program.

(ii) Payment under this paragraph is not limited to the MA rate or fee in effect at the time the services were provided, but may be made to reimburse the recipient's or the recipient's representative's reasonable out-of-pocket expenditures. In addition, payment under this paragraph may be made with respect to services furnished by a provider who is not enrolled in the MA program, if such provider is otherwise lawfully qualified to provide the services, and had not been excluded or otherwise sanctioned from the MA program under Part 515 of this Title.

(iii) For purposes of subparagraph (ii) of this paragraph, an out-of-pocket expenditure will be considered reasonable if it does not exceed 110 percent of the MA payment rate for the service. If an out-of-pocket expenditure exceeds 110 percent of the MA payment rate, the social services district will determine whether the expenditure is reasonable. In making this determination, the district may consider the prevailing private pay rate in the community at the time services were rendered, and any special circumstances demonstrated by the recipient.

(4) Payment may be made to a recipient or the recipient's representative for paid medical bills for services received during the recipient's retroactive eligibility period, provided that the recipient was eligible in the month in which the services were received, in accordance with the provisions of this paragraph.

(i) For services received during the period beginning on the first day of the third month prior to the month of the MA application and ending on the date the recipient applied for MA, payment can be made without regard to whether the provider of services was enrolled in the MA program. However, if the services were furnished by a provider not enrolled in the MA program, the provider must have been otherwise lawfully qualified to provide such services, and must not have been excluded or otherwise sanctioned from the MA program under Part 515 of this Title. If services were provided when the recipient was temporarily absent from the State, payment will be made if: MA recipients customarily use medical facilities in the other state; or the services were obtained to treat an emergency medical condition resulting from an accident or sudden illness.

(ii) For services received during the period beginning after the date the recipient applied for MA and ending on the date the recipient received his or her MA identification card, payment may be made only if the services were furnished by a provider enrolled in the MA program.

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqa@health.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

Statutory Authority:

Section 206(1)(f) of the Public Health Law requires the Department of Health (Department) to enforce the provisions of the medical assistance program, pursuant to titles eleven, eleven-A, and eleven-B of the Social

Services Law (SSL). Section 363-a(2) of the SSL requires the Department to establish such regulations as may be necessary to implement the program of medical assistance for needy persons (Medicaid).

Legislative Objectives:

Section 363-a of the SSL designates the Department as the single State agency responsible for implementing the Medicaid program in this State, and requires the Department to promulgate any necessary regulations which are consistent with federal and State law. The proposed regulatory amendments are necessary to implement the federal district court orders in *Greenstein, et al. v. Dowling, et al.* and *Carroll, et al. v. DeBuono* and the decision of the Court of Appeals in *Seittelman, et al. v. Sabol, et al.*

Needs and Benefits:

The *Greenstein, Carroll and Seittelman* orders impact the Department's requirements regarding when a recipient may be reimbursed for medical expenses he/she has paid during certain periods when he/she was eligible for Medicaid, and the amount of such reimbursement. Current regulations provide that a recipient or his/her representative may be reimbursed for paid medical expenses which should have been paid under Medicaid, when an erroneous determination of ineligibility is reversed by a fair hearing or court order, or by a social services district discovering its own error. Reimbursement is limited to the Medicaid rate or fee in effect at the time medical care or services were provided. A recipient or his/her representative may also be reimbursed for paid medical expenses incurred during the period beginning three months prior to the month of application for Medicaid, and ending with the recipient's receipt of his/her Medicaid identification card (the retroactive period). The individual must be eligible in the month in which the medical care or services were provided, and the medical care or services must have been provided by a provider enrolled in the Medicaid program.

In *Greenstein*, the court enjoined the Department from enforcing the policy limiting corrective payments to the Medicaid rate or fee in effect at the time the services were provided, when an erroneous determination caused the recipient or his/her representative to pay for medical services which should have been paid under Medicaid.

The proposed regulations would reflect the settlement in *Greenstein* which provides that reimbursement of medical expenditures paid by the recipient or his/her representative due to an erroneous determination of ineligibility must not be limited to the Medicaid rate or fee. The settlement also provides that such expenditures are not required to be reimbursed to the extent that such expenditures exceed a reasonable amount.

The plaintiffs in *Seittelman* and *Carroll* challenged the Department's policy of limiting reimbursement of paid medical expenses incurred during the retroactive period to services furnished by providers enrolled in the Medicaid program. The courts agreed, but only for the period commencing on the first day of the third month prior to the month of application and ending upon the date of application for Medicaid. Thus, the proposed regulation would no longer limit reimbursement for paid expenses incurred during such period to Medicaid enrolled providers. However, the provider must be lawfully permitted to provide the services for which the recipient is requesting reimbursement. Reimbursement continues to be limited to the Medicaid rate or fee in effect at the time the services were provided.

Costs:

The Department estimates that the proposed rule, which is required to comply with court orders regarding reimbursement of medical expenses, will result in an annual increase in the State and aggregate local share of Medicaid expenditures of approximately 0.75 to 1.15 million dollars each. There will be no other costs to the Department for implementation or to regulated parties.

Local Government Mandates:

Social services districts currently process requests for reimbursement from recipients who have paid medical expenses which should have been paid by Medicaid. These regulatory amendments may result in a greater volume of such requests due to the requirement to consider bills from non-Medicaid enrolled providers. Also, additional local expenditures may result from the requirement to reimburse amounts above the Medicaid rate or fee.

Paperwork:

No new reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment. Existing claim forms will be used.

Duplication:

The proposed regulatory amendments do not duplicate any existing State or federal requirements.

Alternatives:

The proposed regulatory amendments are required as a result of the Greenstein, Carroll and Seittelman court orders. No alternatives were considered.

- Federal Standards:
- Federal regulations are silent on these issues.
- Compliance Schedule:

Social services districts will be able to implement the proposed amendments when the amendments become effective.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis of this proposed rulemaking is not required by Section 202-b of the State Administrative Procedure Act. This proposed rulemaking would clarify Department regulations which reflect the Department's policy on reimbursement of paid medical expenses for eligible recipients of Medical Assistance. These changes will have a direct impact on this Department and on local social services districts. They will have no effect on any type of small business and there are no new small business recordkeeping requirements, needed professional services, or compliance costs associated with these regulations.

In ascertaining that the proposal will not impose any new reporting, record keeping or other compliance requirements on small business, the Department examined the existing relationships which social services districts have and can have with vendors providing services and/or supplies and found that such relationships will not be affected. A regulatory flexibility analysis is, therefore, not required.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis statement for this proposed action is not required. The proposed amendment would not impose any adverse impact on rural areas nor will the proposed amendment impose any new reporting, record keeping or any other new compliance requirements on public or private entities in rural areas. This proposed rule making will clarify Department regulations reflecting the policy on reimbursement of paid medical expenses for eligible recipients of medical assistance as required by court orders.

Job Impact Statement

Nature of Impact:

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to comply with court orders regarding reimbursement of medical expenses.

Conversion of Occupied Residential Property to Condominium Ownership

I.D. No.	Proposed	Expiration Date
LAW-44-05-00017-P	November 2, 2005	May 1, 2006

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Law publishes a new notice of proposed rule making in the NYS Register.

Conversion of Occupied Residential Property to Cooperative Ownership

I.D. No.	Proposed	Expiration Date
LAW-44-05-00018-P	November 2, 2005	May 1, 2006

Public Service Commission

NOTICE OF ADOPTION

Exemptions from Standby Service by Niagara Mohawk Power Corporation

I.D. No. PSC-39-05-00002-A
Filing date: April 28, 2006
Effective date: April 28, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on April 11, 2006, adopted an order in Case 01-E-1847, approving Niagara Mohawk Power Corporation's request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 207.

Statutory authority: Public Service Law, section 66(12)

Subject: Exemptions from standby service.

Purpose: To approve revisions to Service Classification No. 7.

Substance of final rule: The Commission approved Niagara Mohawk Power Corporation's request to make various tariff amendments to revise its rules for service under S.C. No. 7 - Sale of Standby Service to Customers with On-Site Generation Facilities.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (01-E-1847SA5)

NOTICE OF ADOPTION

Implementation of the Phase II LIRA Program by National Fuel Gas Distribution Corporation

I.D. No. PSC-48-05-00010-A
Filing date: April 26, 2006
Effective date: April 26, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on April 11, 2006, adopted National Fuel Gas Distribution Corporation's request for the implementation of the Phase II Low Income Residential Assistance Program.

Statutory authority: Public Service Law, sections 4(1), 65(1) and 66(1)-(2)

Subject: Implement Phase II of National Fuel Gas Distribution Corporation's Low Income Residential Assistance Program.

Department of Law

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Law publishes a new notice of proposed rule making in the NYS Register.

Cooperative Sponsor Disclosure Requirements - Newly Constructed and Vacant

I.D. No.	Proposed	Expiration Date
LAW-44-05-00015-P	November 2, 2005	May 1, 2006

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Law publishes a new notice of proposed rule making in the NYS Register.

Condominium Sponsor Disclosure Requirements - Newly Constructed, Vacant or Nonresidential

I.D. No.	Proposed	Expiration Date
LAW-44-05-00016-P	November 2, 2005	May 1, 2006

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Law publishes a new notice of proposed rule making in the NYS Register.

Purpose: To approve the program.

Substance of final rule: The Commission adopted an order approving National Fuel Gas Distribution Corporation's request for implementation of the Phase II Low Income Residential Assistance Program provided for in the Rate Plan adopted by the Commission on July 22, 2005, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-G-1047SA2)

NOTICE OF ADOPTION

Transfer of Certain Cable System Properties by Shaner Cable, Inc. and Atlantic Broadband (Penn), LLC

I.D. No. PSC-05-06-00019-A

Filing date: May 1, 2006

Effective date: May 1, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on April 11, 2006, adopted an order approving the transfer of system assets, franchises, and certificates of confirmation in Cattaraugus County, New York from Shaner Cable, Inc. d/b/a El-Mar Communications to Atlantic Broadband (Penn), LLC.

Statutory authority: Public Service Law, section 222

Subject: To transfer certain cable system properties, franchises and certificates of confirmation of Shaner Cable, Inc. to Atlantic Broadband (Penn), LLC.

Purpose: To approve transferring certain cable system properties, franchises and certificates of confirmation.

Substance of final rule: The Commission adopted an order approving a joint petition of Shaner Cable, Inc. d/b/a El-Mar Communications and Atlantic Broadband (Penn), LLC to transfer certain cable system properties, franchises and certificates of confirmation from Shaner Cable, Inc. to Atlantic Broadband (Penn), LLC, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-V-1551SA1)

NOTICE OF ADOPTION

Schedule for Electric Service by Niagara Mohawk Power Corporation

I.D. No. PSC-08-06-00008-A

Filing date: April 28, 2006

Effective date: April 28, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The commission, on April 11, 2006, adopted an order in Case 01-E-1847, approving Niagara Mohawk Power Corporation's request to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 207.

Statutory authority: Public Service Law, section 66(12)

Subject: Consideration of Service Classification No. 7 — Sale of Standby Service to customers with on-site generation facilities and Service Classification No. 11 to allow for customer service agreements to be amended to permit customers to self-supply a portion of their electric load through on-site generation.

Purpose: To approve revisions to Service Classification No. 7 to permit a waiver of the competitive transition charge associated with a customer's applicable standby contract demand charge for qualifying distributed generation projects, and to approve revisions to Service Classification No. 11 to allow for customer service agreements to be amended to permit customers to self-supply a portion of their electric load through on-site generation.

Substance of final rule: The Commission adopted an order approving Niagara Mohawk Power Corporation's request to make various tariff amendments to revise its rules for service under S.C. No. 7 — Sale of Standby Service to Customers with On-Site Generation Facilities and S.C. No. 11 — Individually Negotiated Contract Rates.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(01-E-1847SA6)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Rate Increase by St. Lawrence Gas Company, Inc.

I.D. No. PSC-20-06-00014-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve, reject or modify, in whole or in part, a proposal filed by St. Lawrence Gas Company, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service — P.S.C. No. 3. The effective date of the proposed changes is subject to suspension through Nov. 26, 2006. Through negotiations, parties may develop alternative proposals for the commission's consideration.

Statutory authority: Public Service Law, section 66(12)

Subject: Major rate increase.

Purpose: To consider whether to increase annual gas revenues by approximately \$2.9 million, or 6.92 percent, and whether to grant the company's request for waiver of the 150-day provision of the commission's statement of policy on test periods in rate proceedings.

Public hearing(s) will be held: 10:00 a.m., June 21, 2006* at Public Service Commission, Three Empire State Plaza, 19th Fl. Board Rm., Albany, NY

*There could be requests to reschedule the hearing. Notification of any subsequent changes will be available at the DPS Web site (www.dps.state.ny.us) under Case No. 05-G-1635.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Substance of proposed rule (Full text is not posted on a State website): The Commission is considering whether to approve, reject, or modify, in whole or in part, a proposal filed by St. Lawrence Gas Company, Inc. (the company) to make various changes in the rates, charges, rules and regulations contained in its gas tariff schedule, P.S.C. No. 3, to produce an increase of about \$2.9 million, or 6.92% , in annual gas revenues. The effective date of the proposed changes is subject to suspension through November 26, 2006. Through negotiations, parties may develop alternative proposals for the Commission's consideration.

The Commission is also considering whether to grant the company's request for waiver of the Commission's Statement of Policy on Test Periods in Major Rate Proceedings which requires that a rate case filing

must consist of operating results for a twelve month period expiring at the end of a calendar quarter no earlier than 150 days before the date of the filing. The company contends that it needs the waiver because it needed additional time to prepare its filing and states that the test year remains representative and is not stale.

Text of proposed rule and any required statements and analyses may be obtained from: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: Five days after the last scheduled public hearing.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-G-1635SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Disposition of Refunds by Verizon New York Inc.

I.D. No. PSC-20-06-00012-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by Verizon New York Inc. (Verizon) to retain that portion of an approximately \$3 million property tax refund, \$2 million of which is allocable to its regulated intrastate New York operations, received from the Town of Oyster Bay on Feb. 17, 2006.

Statutory authority: Public Service Law, section 113(2)

Subject: Disposition of refunds received by regulated companies.

Purpose: To consider a petition by Verizon to retain that portion of a tax refund allocable to its regulated, intrastate New York operations received on Feb. 17, 2006.

Substance of proposed rule: On April 18, 2006 Verizon New York Inc. (Verizon) filed a petition proposing a disposition of the portion of a tax refund allocable to its regulated, intrastate New York operations. The tax refund (of approximately \$3,000,000 in total) was the result of the successful litigation of a property tax claim against the Town of Oyster Bay. Verizon requests permission to retain that portion of the tax refund allocable to its regulated, intrastate New York operations (approximately \$2,000,000). The Commission may approve or reject in whole or in part, the company's request to retain that proposed portion of the tax refund allocable to its regulated, intrastate New York operations.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-C-0480SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Submetering of Electricity by Hines Interests Limited Partnership

I.D. No. PSC-20-06-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Hines Interests Limited Partnership, on behalf of WXIV/Broadway Grand Realty, LLC, to submeter electricity at 40 Mercer St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66 (1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of Hines Interests Limited Partnership, on behalf of WXIV/Broadway Grand Realty, LLC, to submeter electricity at 40 Mercer St., New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Hines Interests Limited Partnership, on behalf of WXIV/Broadway Grand Realty, LLC, to submeter electricity at 40 Mercer Street, New York, New York.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-E-0455SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Cash-Out Mechanism by Rochester Gas and Electric Corporation

I.D. No. PSC-20-06-00015-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, or modify in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 16.

Statutory authority: Public Service Law, section 66(12)

Subject: Cash-out mechanism for energy service companies.

Purpose: To institute a cash-out mechanism for energy service companies that over deliver gas on the Empire Pipeline.

Substance of proposed rule: The Commission is considering Rochester Gas and Electric Corporation's request to institute a cash-out mechanism for Energy Service Companies that over-deliver gas on the Empire Pipeline.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(06-G-0511SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Water Rates and Charges by Birch Hill Water Supply Corporation

I.D. No. PSC-20-06-00016-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed by the Birch Hill Water Supply Corporation to make a change in the rates and charges contained in its tariff schedule P.S.C. No. 3—Water, to become effective July 20, 2006.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Water rates and charges.

Purpose: To continue Birch Hill Water Supply Corporation’s escrow account established in Statement No. 1 to cover the cost of a new well or redevelopment of existing wells.

Substance of proposed rule: On April 27, 2006, the Birch Hill Water Supply Corporation (Birch Hill) filed to become effective July 20, 2006, Escrow Account Statement No. 2 to its tariff schedule P.S.C. No. 3 – Water. The proposed filing would continue the \$55 per customer surcharge, established in Escrow Account Statement No. 1, for an additional two billing periods. The maximum balance allowed, excluding accrued interest, would be increased from \$15,000 to \$22,800 and would cover the cost of a new well or the redevelopment of existing wells. The Commission may approve or reject, in whole or in part, or modify the company’s request.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

Data, views or arguments may be submitted to: Jaclyn A. Brillig, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0498SA1)

Racing and Wagering Board

NOTICE OF ADOPTION

Grand Slam Wager

I.D. No. RWB-03-06-00005-A

Filing No. 534

Filing date: May 1, 2006

Effective date: May 17, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Renumbering of section 4122.48 to section 4122.49 and addition of new section 4122.48 to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 301, 305 and 318

Subject: The Grand Slam wager is an exotic wager in harness racing, involving a single bet on four races, evidenced by a single ticket and representing an interest in a single betting pool.

Purpose: To offer a new wager that is attractive to both neophytes and experienced bettors, thereby increasing wagering handle and revenues to the State. The baseball term “Grand Slam” means to hit a home run with

the bases loaded. This proposed wager is designed to have the bettor select one or more horses in each of the first three Grand Slam races and the selected horse or horses must officially finish first, second, or third—thus, “loading the bases.” To complete the winning wager, the bettor must be correct in forecasting the official winner of the fourth and final race—thus “hitting a home run.”

Text or summary was published in the notice of proposed rule making, I.D. No. RWB-03-06-00005-P, Issue of January 18, 2006.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Refunds to Bettors

I.D. No. RWB-03-06-00007-A

Filing No. 532

Filing date: May 1, 2006

Effective date: May 17, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 4009.21 and 4115.10 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301

Subject: Refunds to bettors who have wagered on a specific horse that has been declared a “non-starter” after such horse has been obstructed or interfered with at the start of a race. This amendment applies to both the thoroughbred and harness rule regarding refunds for non-starters.

Purpose: To allow bettors who have wagered on a horse that has been declared a “non-starter” to collect on their “win” payouts if the non-starter horse finishes in first place, despite being interfered with or otherwise obstructed at the start of the race. Under the current rule, if a horse is a declared a non-starter, all wagers on the horse are refunded. This may not always be the preferred option of the wagering public. There may be instances where a horse may have been interfered with or otherwise obstructed at the beginning of a race and is able to recover and beat the field. In such instances, the bettor would prefer to receive the “win” payout rather than receive a refund of the original wager. If the non-starter horse finishes in any position lower than “win,” a full refund will be granted because the interference or obstruction may have played a factor in preventing the horse from finishing first.

Text or summary was published in the notice of proposed rule making, I.D. No. RWB-03-06-00007-P, Issue of January 18, 2006.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Parlay Betting at Horse Racing Tracks

I.D. No. RWB-06-06-00008-A

Filing No. 531

Filing date: May 1, 2006

Effective date: May 17, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 4010.6 and 4122.38 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 227 and 909

Subject: Parlay betting at harness and thoroughbred racetracks and the number of races and pools in which a series of parlay bets may be made.

Purpose: To increase the number of races on which parlay betting can occur by including proposition wagering pools, thereby offering fans more variety in wagering opportunities.

Text or summary was published in the notice of proposed rule making, I.D. No. RWB-06-06-00008-P, Issue of February 8, 2006.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5044, e-mail: info@racing.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Proposition Wager

I.D. No. RWB-06-06-00009-A

Filing No. 533

Filing date: May 1, 2006

Effective date: May 17, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 4011.25 and 4122.47 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 227, 301, 305 and 909

Subject: Proposition wager.

Purpose: To authorize the conduct of the pari-mutuel wager known as a "proposition wager" to be offered by racing associations or corporations on its own races and to approve proposition wagers.

Text or summary was published in the notice of proposed rule making, I.D. No. RWB-06-06-00009-P, Issue of February 8, 2006.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, e-mail: info@racing.state.ny.us

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Administration of Race Day Medications by Veterinarians

I.D. No. RWB-20-06-00010-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: This is a consensus rule making to amend section 4005.5 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, section 101

Subject: Administration of race day medications by veterinarians employed by the New York State Racing and Wagering Board and licensed thoroughbred racing associations.

Purpose: To allow the administration of board-authorized race day medications to horses that are quartered in limited access security barns by board or association veterinarians.

Text of proposed rule: Amendment is made to section 4005.5 of 9E NYCRR to add new language:

No veterinarian employed by the commission or by an association shall be permitted, during the period of his employment, to treat or prescribe for any horse for compensation or otherwise, except in case of emergency, or in the case of race day medication as authorized by Board Rule 4043.2.

Text of proposed rule and any required statements and analyses may be obtained from: Mark A. Stuart, Assistant Counsel, Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206, (518) 453-8460, e-mail: mstuart@racing.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Consensus Rule Making Determination

Board staff has determined that no person is likely to object to the rule as written because it makes technical changes to allow certain veterinarians to administer medications and is otherwise non-controversial because it was requested by one of the two licensed thoroughbred racing associations in the State of New York.

The amendment to amend section NYCRR 4005.5 entitled "Veterinarians restricted" was requested by one of the two licensed thoroughbred racing associations in order to allow board or association veterinarians to administer race day medications as permitted under Board Rules. This rule amendment became necessary after security barn regulations were adopted by the New York Racing Association that restricted access to thoroughbred horses at racetracks. These security barn rules were designated to deter and detect the unlawful administration of medications to racehorses. Board and association veterinarians are neutral third parties who, by the nature of their official roles, are best suited to ensure proper administration of medications in a security barn setting. The racing association at Finger Lakes has not adopted security barn regulations that would require the adoption of this rule amendment and would not be affected by this rule amendment.

No person is likely to object to the adoption of this veterinarian medication rule because it is necessary in light of rules designed to prevent the unlawful administration of medications to race horses. The alternative would be to prohibit board or association veterinarians to administer medications, which would impair the ability of racehorses that require lawful race day medications to compete. The other alternative would be to allow non-board or non-association veterinarians to administer race day medications in the security barn setting. Doing so would possibly corrupt the controls of the security barn setting and undermine the limited access objectives.

Job Impact Statement

A job impact statement is not required because the Board has determined that, as apparent from its nature and purpose, this rule will not have a substantial adverse impact on jobs and employment opportunities. This rule will have no impact on jobs and employment opportunities. This rule applies only to the administration of race-day medications by veterinarians employed by either the state or a thoroughbred racing association. This rule only applies to thoroughbred horses that are quartered in a security barn. Private veterinarians will still be required and employed for the care and health of thoroughbred horses outside of the 24-hour security barn requirements.

Office of Real Property Services

EMERGENCY RULE MAKING

Training Requirements for New York City Assessors

I.D. No. RPS-20-06-00006-E

Filing No. 525

Filing date: April 28, 2006

Effective date: April 28, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Subpart 188-8 to Title 9 NYCRR.

Statutory authority: Real Property Tax Law, art. 3, title 3 and section 210(1)

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Chapter 139 of the Laws of 2005 requires the State Board to have a program in place for the training of New York City assessors by April 1, 2006.

Subject: Training requirements for New York City assessors.

Purpose: To establish a program of training, certification and minimum qualifications for New York City assessors.

Text of emergency rule:

SUBPART 188-8
NEW YORK CITY ASSESSORS

Section 188-8.1 Certification requirements for New York City assessors, generally. (a) This subpart applies to all individuals who perform professional appraisal duties relating to the assessment of property for the real property tax. On or before April 1 each year ORPS will provide the Department of Citywide Administrative Services with a list of those agencies of the City government and the job titles within those agencies that are subject to the provisions of this subpart. Additions to or deletions from that list may be made at any time.

(b) Each assessor serving on the effective date of this subpart must attain certification by April 1, 2008.

(c) A State certified assessor must be recertified upon a reappointment where there has been an interruption of continuous service of at least four years.

Section 188-8.2 Minimum qualification standards for New York City assessors. (a) The minimum qualification standards for appointed assessors are as follows:

(1) (i) graduation from high school, or possession of an accredited high school equivalency diploma; and

(ii) two years of satisfactory full-time paid experience in an occupation involving the valuation of real property, such as assessor, appraiser, valuation data manager, real property appraisal aide or the like. Such experience shall be deemed satisfactory if it is demonstrated that the experience primarily was gained in the performance of one or more of the following tasks: collection and recording of property inventory data, preparation of comparable sales analysis reports, preparation of signed valuation or appraisal estimates or reports using cost, income or market data approaches to value. Mere listing of real property for potential sale, or preparation of asking prices for real estate for potential sale, using multiple listing reports or other published asking prices is not qualifying experience; or

(2) graduation from an accredited two-year college and one year of the experience described in subparagraph (1)(ii) of this subdivision; or

(3) graduation from an accredited four-year college and six months of the experience described in subparagraph (1)(ii) of this subdivision; or

(4) certification by the State Board as a candidate for assessor.

(b) In evaluating the experience described in subparagraph (1)(ii) of subdivision (a), the following conditions shall apply:

(i) for the purpose of crediting full-time paid experience, a minimum of 30-hour per week shall be deemed as full-time employment;

(ii) three years of part-time paid experience as sole assessor or as chairman of the board of assessors shall be credited as one year of full-time paid experience, and five years of part-time paid experience as a member of a board of assessors shall be credited as one year of full-time paid experience. Additional paid part-time experience in excess of these amounts shall be credited proportionately;

(iii) volunteer experience in an assessor's office may be credited as paid experience to the extent that it includes tasks such as data collection; calculation of value estimates; preparation of preliminary valuation reports; providing routine assessment information to a computer center; public relations; and review of value estimates, computer output and exemption applications; and

(iv) in no case shall less than six months of the experience described in subparagraph (1)(ii) of subdivision (a) be acceptable.

Section 188-8.3 Basic course of training for New York City assessors. (a) The basic course of training shall include the following components:

- (1) assessment administration (New York City);
- (2) fundamentals of data collection;
- (3) fundamentals of real property appraisal;
- (4) income approach to valuation;
- (5) advanced income approach to valuation;
- (6) ethics;
- (7) fundamentals of mass appraisal; and
- (8) computer assisted mass appraisal modeling.

(c) Successful completion of the basic course of training shall be demonstrated by fulfilling the requirements for all required components and passing all of the prescribed examinations for the components.

(d) An individual who has successfully completed a training session not conducted or approved by ORPS, which presented topics similar to those in one or more of the components of the basic course of training, may request that this session be accepted as satisfaction of such component or

components. The individual must submit the same supporting material as required by section 188-2.8 of this Part for obtaining continuing education credit. In no event will any training be accepted that was successfully completed more than three years prior to the date that the assessor became subject to the provisions of this Subpart.

(e) If ORPS determines that the training session is not an acceptable substitute for successful completion of a component or components of the basic course of training, ORPS shall provide written notification of that determination to the individual. Such notice shall set forth the reasons for the determination and state that the person may request a review of such determination.

(f) An individual adversely affected by a determination may request a review within 15 days of such determination. Such request must be made in writing and be addressed to the executive director.

(g) The executive director shall provide the applicant with written notification of his or her affirmation or reversal of the initial determination, including the reasons for such decision.

(h) An individual shall have up to two opportunities through examinations to successfully complete a component of the basic course of training without attending classroom instruction. A failure of the examination or failing to attend an examination is considered an opportunity.

Section 188-8.4 Interim certification for New York City assessors. [reserved]

Section 188-8.5 Continuing education requirement for New York City assessors. [reserved]

Section 188-8.6 Reimbursement of expenses for New York City assessors. (a) Certain expenses incurred by an assessor in successfully completing a component of the basic course of training set forth in section 188-8.3 of this Subpart, or while attending a training course, conference or seminar with the approval of ORPS shall be a State charge subject to audit by the State Comptroller, subject to the following:

(1) The course or seminar and the expenses must be approved by ORPS.

(2) The assessor must successfully complete the course or seminar, as demonstrated by passing the examination for the course or seminar, or, if no such examination was offered, by proof of attendance at the course or seminar.

(b) Where the conditions in subdivision (a) of this section have been satisfied, reimbursement shall be in the same manner and to the same extent that employees of the State of New York who are members of the Professional, Scientific and Technical unit are reimbursed for travel expenses except as provided below:

(1) Reimbursement for non-overnight travel mileage shall be limited to a maximum of one hundred miles per day, unless either the component is not offered within fifty miles of the official station of the assessor, or ORPS approves attendance at a component offered beyond 50 miles where attendance is found by ORPS to be more practicable;

(2) Expenses for room and board shall be allowed if an assessor can demonstrate that commuting to and from the location of a component will create undue hardship or a component is not offered within 50 miles of the official station of the assessor;

(3) Tuition fees will be reimbursed at a rate that is usual and reasonable for that type of training;

(4) Reimbursement for completing components of the basic course of training for attaining certification as a State Certified Assessor and for satisfaction of continuing education requirements shall be made only upon claims submitted no later than 30 days following completion of such training. Submissions by mail shall be deemed to have been submitted when postmarked. Claims submitted more than 30 days following the completion of such training will be reviewed for possible payment on or before the first day of June of the succeeding fiscal year. If funds remain from the appropriation for training reimbursement in the fiscal year in which the assessor completed such training, claims will be paid in full or, if the remaining funds are insufficient, prorated.

(c) Requests for reimbursement shall be made on a State of New York standard voucher (AC92) and any other form required by the State Office.

(d) Reimbursement shall be dispersed as follows:

(1) Upon appropriation of an amount for reimbursement of expenses pursuant to this Part in the State Budget, this appropriation shall be divided into three allotments, an allotment of one-half of the total appropriation, to be referred to as the first allotment, an allotment of one-third of the total appropriation, to be referred to as the second allotment, and an allotment of one-sixth of the total appropriation, to be referred to as the third allotment.

(2) Reimbursement for successful completion of one or more components of the basic course of training shall be made in the full amount due under this Part as vouchers are received.

(3) Reimbursement for training completed between April 1 and July 31 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts due shall be totaled and compared to the first allotment minus all payments of reimbursement for basic training; this constitutes the net first allotment. If the total of possible reimbursement is equal to the net first allotment, the full amount due shall be paid for each voucher. If the total of possible reimbursement is less than the net first allotment, the full amount due shall be paid for each voucher and the remainder shall be added to the second allotment. If the total of possible reimbursement is more than the net first allotment, the total of possible reimbursement shall be divided into the net first allotment. The resulting fraction is the first proration factor. The first proration factor shall be applied to each continuing education voucher to determine the reimbursement payment to be made for each of these vouchers.

(4) Reimbursement for training completed between August 1 and November 30 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts shall be totaled and compared to the second allotment, minus all payments of reimbursement for basic training plus any addition resulting from paragraph (3); this constitutes the net second allotment. If the total of possible reimbursement is equal to or less than the net second allotment, the full amount shall be paid for each voucher and any remainder shall be added to the third allotment. If the total of possible reimbursement is more than the net second allotment, the total of possible reimbursement shall be divided into the net second allotment. The resulting fraction is the second proration factor. The second proration factor shall be applied to each continuing education voucher amount to determine the reimbursement payment to be made for each of these vouchers.

(5) Reimbursement for training completed between December 1 and March 31 of each fiscal year in compliance with the continuing education requirements of this Part shall be made in accordance with this paragraph. All such amounts shall be totaled and compared to the third allotment, minus all payments of reimbursement for basic training plus any addition resulting from paragraph (4); this constitutes the net third allotment. If the total of possible reimbursement is equal to or less than the net third allotment, the full amount shall be paid for each voucher. If the total of possible reimbursement is more than the net third allotment, the total of possible reimbursement shall be divided into the net third allotment. The resulting fraction is the third proration factor. The third proration factor shall be applied to each continuing education voucher amount to determine the reimbursement payment to be made for each of these vouchers.

(e) Whenever any training is deemed to satisfy the requirements of this subpart, for purposes of reimbursement pursuant to this section, the training shall be deemed to have been completed on the date upon which it is deemed to satisfy the appropriate training requirement. The local official receiving credit for the training shall be provided with the necessary voucher and information which must be returned completed within thirty days.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire July 26, 2006.

Text of emergency rule and any required statements and analyses may be obtained from: James J. O'Keefe, General Counsel, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, e-mail: internet.legal@orps.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Section 202(1)(l) of the Real Property Tax Law (RPTL) authorizes the State Board of Real Property Services to adopt such rules "as may be necessary for the exercise of its powers and the performance of its duties."

Title 3 of Article 3 of the RPTL requires assessors employed by New York City to obtain certification from the State Board of Real Property Services.

2. Legislative Objectives: The training and certification of New York City assessors.

3. Needs and Benefits: Title 3 of Article 3 of the Real Property Tax Law, as added by Chapter 139 of the Laws of 2005, requires the State Board of Real Property Services to establish, in rule, a program for the qualifications, training and certification of New York City assessors. The genesis of this bill was the recent scandal involving assessors in the Department of Finance. The Department had approximately 175 individu-

als serving as assessors who were valuing annually each of the City's almost one million parcels with minimal supervision. The allegation was that some assessors were systematically overvaluing parcels, particularly commercial buildings in Manhattan, and subsequently reducing those values in return for bribes.

Under Title 2 of Article 3, the State Board of Real Property Services has the responsibility for the training and certification of local assessment personnel outside of the assessing units of New York City, Nassau County, Buffalo, Rochester, Syracuse, Albany and Yonkers. This program entails the qualifications, certification and continuing education of the individuals holding 802 appointive assessor positions and 55 county directors of real property tax service agencies, the certification of 489 elective assessor positions, and the qualifications and certification of 94 candidates for assessor and 49 real property appraisers. The State Board prescribes the various standards and requirements for minimum qualifications, certification and continuing education. The Board is also authorized to enforce these requirements through proceedings to remove from office those not in compliance.

Under the present program, the qualifications of appointive assessors are submitted to the agency prior to the municipality making the appointment. If the agency approves the applicant's qualifications, the newly appointed assessor must obtain certification within three years. During that time the assessor must maintain an interim certification by making mandated progress toward certification. If an assessor is unable to obtain certification in the required time due to reasons beyond the assessor's control, that assessor may seek a temporary certificate to enable the assessor to continue in office until certified. Once certified, appointive assessors must satisfy continuing education requirements. Assessors can obtain reimbursement for necessary expenses incurred in complying with these training requirements.

The Final Report of the New York City Department of Finance and Department of Investigation Joint Task Force Charged with eliminating Corruption in the Department of Finance's Real Property Assessment Unit (January 2004) contained a recommendation to "Require Assessors to Attain the Same Professional Credentials and Standards Required Throughout New York State" (IV[A], p.11). The recommendation included requiring the "State Certified Assessor- Advanced" designation issued by the New York State Office of Real Property Services (NYSORPS), which is not part of the mandated training program. Although this report may have been the genesis of this legislation, its recommendations are not incorporated directly.

Title 3 contains some but not all of the existing provisions for appointive assessors. New York City Assessors have to obtain certification by completing required training, passing a comprehensive examination or receive a waiver based upon a professional designation (§ 354[1][2][3]). These provisions are parallel to those in Title 2 (§ 318[1][2][3]). However, the time limit and interim certification provisions in section 318(1) have not been included. The effective date provides two years for current assessors to obtain certification. The drafters apparently recognized the need for time to attend required training but did not reflect this need in the new program. Certification may thus be a prerequisite to appointment. This is similar to the requirement for town and village justices, who must be trained before serving (Uniform Justice Court Act, § 105), rather than the existing assessor provisions that allow an assessor to serve for up to three years without having obtained certification.

Section 354(4) repeats the language in 318(4) concerning state reimbursement, including the phrase "including continuing education prescribed by the state board". However, the bill does not repeat the language in 310(5)(b) authorizing the State Board to prescribe a continuing education program. Given that the removal provisions of section 358 do not include failure to satisfy continuing education requirements as grounds for removal (c.f. § 322[1][f]), it may be that the reference to continuing education was unintentional and that the Board can not prescribe such a program.

It is unclear which City employees the bill encompasses. New section 352 would have the Board establish minimum qualifications for "(a) chief or inferior assessors and (b) other administrative positions having professional appraisal duties relating to the assessment of real property for purposes of taxation". However, the certification requirements only apply to assessors (§ 354) and candidates for assessor (§ 356). Even if provisions only apply to assessors, the position "city assessor" exists in three different City agencies – the Departments of Finance and Law and the Tax Commission. In addition, appraiser positions exist in departments other than Finance.

The draft rules avoid the question of which City employees are subject to the requirements by making this an annual determination (188-8.1[a]).

This will allow ORPS to ensure regularly that the correct individuals are covered. ORPS would make the determination each April 1 and could change it at any time.

In the absence of an interim certification program in the statute, section 188-8.6 is reserved for the necessary provisions should the statute be amended. The rules are silent on whether new assessors have to be certified before appointment. If the statute is not amended, this provision would be implicit and could be added later. Similarly, in the absence of the authority to mandate continuing education, section 188-8.7 is reserved for the necessary provisions should the statute be amended.

The basic course of training consists of the following components:

- (1) assessment administration (New York City);
- (2) fundamentals of data collection;
- (3) fundamentals of real property appraisal;
- (4) income approach to valuation;
- (5) advanced income approach to valuation;
- (6) ethics;
- (7) fundamentals of mass appraisal; and
- (8) computer assisted mass appraisal modeling.

Training taken within three years of the requirements taking effect would be accepted (188-8.5[d]).

4. Costs: (a) To State Government: For the current fiscal year, none. As the program is implemented, starting in 2006-07, there will be additional ORPS resources needed, although no estimate has been made. In addition, the funds for reimbursement to local officials for training expenses, \$350,000 for the current fiscal year, will have to be increased in 2006-07 to provide for the expenses of training New York City assessors.

(b) To local governments: The implementation of Title 3 by this proposal will result in lost productivity as New York City assessors take time from training as well as imposing reporting and recordkeeping requirements on the City. In addition, the City may absorb some of the costs of training assessors.

(c) To private regulated parties: None. There are no private regulated parties in this program.

(d) Basis of cost estimates: Past experience and the requirements of Title 3.

5. Local Government Mandates: Title 3 places the mandate on the City of having its assessors trained and certified, with the corollary loss of productivity and recordkeeping. This proposal implements that mandate.

6. Paperwork: Implementation of the program will require maintenance of over 125 training records by the New York State Office of Real Property Services and by the City.

7. Duplication: There are no comparable State or Federal requirements.

8. Alternatives: The proposal could have imposed the existing course of training, resulting in a course of training that is less responsive to the needs of the City. The proposal could have required training that is not as readily available. The proposal could have mandated the same reporting requirements on the City that other local governments face.

9. Federal Standards: There are no Federal regulations concerning this subject.

10. Compliance Schedule: None. Chapter 139 contains the requirement that those assessors currently employed must obtain certification by April 1, 2008. This requirement is not repeated in the proposal.

Regulatory Flexibility Analysis

The amendment proposed would not impose any adverse economic conditions or any reporting, recordkeeping or other compliance requirements on small businesses.

The rule will require New York City to provide information on the appointment of assessors and training they may be taking to satisfy the requirements of the proposal. In addition, the City may suffer a loss in productivity as approximately 150 employees attend approximately 35 hours of training over a two year period. Both of these effects are necessary given the mandate of Chapter 139 of the Laws of 2005, which added Title 3 to Article 3 of the Real Property Tax Law, to require State certification of New York City assessors.

However, the agency has attempted to mitigate the impact on the City. The proposal assures the only the appropriate individuals are subject to the requirements by making this an annual determination. The notice requirement for new assessors is less complicated than the existing requirement for other municipalities, which must submit qualifications of appointees to this agency prior to appointments (9 NYCRR 188-2.4[a]). The basic course of training has been tailored to the needs of the City rather than simply imposing the existing course in 9 NYCRR 188-2.6. Most of the training is available from the International Association of Assessing Officers. By requiring training that can be provided by professionals at

centralized locations, the proposal further mitigates the impact on the City and its assessors. And finally, the proposal is the result of discussions with the City, discussions to which individual assessors have had input.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this rule making because the proposal only applies to New York City.

Job Impact Statement

A job impact statement is not required for this rule making because the amendment only concerns New York City civil servants and administration of a statutorily required program by New York City and The New York State Office of Real Property Services.

Department of State

EMERGENCY RULE MAKING

General Liability Insurance for Licensed Home Inspectors

I.D. No. DOS-20-06-00007-E

Filing No. 529

Filing date: May 1, 2006

Effective date: May 1, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 197 and Subpart 197-1 to Title 19 NYCRR.

Statutory authority: Real Property Law, sections 444-k and 444-l

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: This rule was adopted on an emergency basis to preserve the public welfare. Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law provides, in part, that, on and after December 31, 2005, no person shall conduct a home inspection for compensation unless such person is licensed as a home inspector pursuant to article 12-B. Further, section 444-k of Article 12-B provides that every licensed home inspector shall secure, maintain and file with the Secretary of State proof of a certificate of liability coverage, the terms and conditions of which shall be determined by the Secretary of State. Accordingly, in order to ensure that prospective applicants will know the terms and conditions of the required liability coverage before this rule is adopted on a permanent basis, this rule has been adopted on an emergency basis.

Subject: General liability insurance for licensed home inspectors.

Purpose: To establish the type and amount of liability coverage that will be required of licensed home inspectors.

Text of emergency rule: A new Part 197 and Subpart 197-1 of Title 19 of the NYCRR are adopted to read as follows:

Part 197

Home Inspectors

Subpart 197-1 Business practices and standards

Section 197-1.1 Liability Coverage

(a) Every applicant and every licensed home inspector shall secure, maintain, and file with the Department of State proof of general liability insurance of at least \$150,000 per occurrence and \$500,000 in the aggregate.

(b) Every proof of liability coverage shall provide that cancellation or nonrenewal of the policy shall not be effective unless and until at least ten days' notice of intention to cancel or nonrenew has been received in writing by the Secretary of State.

(c) In addition, every proof of liability coverage shall include the following information:

(1) the name and business address of the insured;

(2) the name, business address and telephone number of insurance company;

(3) the policy number;

(4) the term of the policy; provided, however, that the proof of liability coverage shall provide that the coverage shall not expire until a notice of intention to cancel or non-renewal has been received in writing

by the Secretary of State at least ten days prior to the date of cancellation or non-renewal;

(5) a statement indicating that the policy provides general liability coverage of at least \$150,000 per occurrence and \$500,000 in the aggregate.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire July 29, 2006.

Text of emergency rule and any required statements and analyses may be obtained from: Whitney A. Clark, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740, e-mail: WClark@dos.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law was enacted as Chapter 461 of the Laws of 2004 and subsequently amended by Chapter 225 of the Laws of 2005. Section 444-d of Article 12-B provides, in part, that on and after December 31, 2005, no person shall perform a home inspection for compensation unless such person is licensed as a home inspector. Further, § 444-k of Article 12-B provides that every licensed home inspector shall secure, maintain and file with the Secretary of State proof of a certificate of liability coverage, the terms and conditions of which shall be determined by the Secretary of State. In addition, the Real Property Law, § 444-l, authorizes the Department of State to adopt such rules and regulations as shall be necessary to implement the home-inspection licensing program. This rule establishes the type and amount of the liability coverage that will be required of licensed home inspectors. Accordingly, the Department of State has express authority to adopt this rule.

2. Legislative objectives:

By enacting Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, the Legislature sought, in part, to ensure that home inspectors would be qualified by training and experience and that home inspectors would maintain liability coverage, the terms and conditions of which would be determined by the Department of State. This rule establishes the type and amount of the liability coverage that will be required of licensed home inspectors. Accordingly, this rule advances the objectives that the Legislature sought to advance when it enacted Article 12-B.

3. Needs and benefits:

The rule is needed because, without the rule, home-inspector applicants could not comply with Real Property Law, § 444-k, which requires that an applicant obtain and file with the Department of State proof of liability coverage, the terms and conditions of which shall be prescribed by the Department of State. By adopting this rule, the Department of State has ensured that home-inspector applicants can obtain liability coverage that will allow the applicants to comply with § 444-k.

4. Costs:

a. Costs to regulated parties:

The Department of State solicited comments and costs from several insurance agents, and the estimated cost was \$500 per year for general liability insurance in the amount of \$150,000 per occurrence and \$500,000 in the aggregate.

b. Costs to the Department of State:

The Department of State anticipates that the cost of implementation and continued administration of this rule will be minimal and that implementation and administration will be accomplished using existing resources.

c. Cost to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The Real Property Law, § 444-k, provides that every licensed home inspector shall secure, maintain and file with the Department of State proof of liability coverage. This rule provides that the proof of liability coverage shall contain the following information:

(1) the name and business address of the insured;

(2) the name, business address and telephone number of insurance company;

(3) the policy number;

(4) the term of the policy; provided, however, that the proof of liability coverage shall provide that the coverage shall not expire until a notice of intention to cancel or non-renewal has been received in writing by the

Secretary of State at least ten days prior to the date of cancellation or non-renewal;

(5) a statement indicating that the policy provides general liability coverage of at least \$150,000 per occurrence and \$500,000 in the aggregate.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state of federal requirement.

8. Alternatives:

The Department of State was advised by several insurance agents that there are three basic forms of liability coverage available to businesses. They are automobile liability insurance, general liability insurance, and errors-and-omissions liability insurance. The Department of State decided to require general liability insurance. Automobile liability insurance was rejected as an option because it is already required by State law for any vehicle registered in the State of New York. Errors-and-omissions liability insurance was rejected because the Legislature had not specified errors-and-omissions liability insurance. An early version (A. 76-A) of Article 12-B had specified errors-and-omissions insurance in the amount of \$500,000 per occurrence. However, the final version (A. 76-B) dropped the errors-and-omissions liability insurance and substituted "liability coverage, which terms and conditions shall be determined by the Secretary of State . . ." Accordingly, the Department of State interpreted that change as an indication that the Legislature did not intend to require that home inspectors obtain errors-and-omissions liability insurance.

9. Federal standards:

There are no federal standards prescribing insurance for licensed home inspectors. Accordingly, this rule does not exceed any existing federal standard.

10. Compliance schedule:

The Department of State anticipates that home inspectors will be able to immediately comply with this rule.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will affect persons wishing to be come licensed as home inspectors. However, the Department of State is not able to predict how many persons intend to become licensed as home inspectors. The Department believes that all such persons can be classified as small businesses for the purpose of this analysis.

The rule does not apply to local governments.

2. Compliance requirements:

The reporting and recordkeeping requirements are detailed in section 6 of the Regulatory Impact Statement. Those requirements will affect the small businesses identified in section 1 of this Analysis.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Small businesses will not need professional services in order to comply with this rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

Estimates of the costs of compliance are detailed in section 4 of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

The estimated cost of compliance, as set forth in section 6 of the Regulatory Impact Statement, suggests that it will be economically feasible for small businesses to comply with the rule. Compliance with the rule will not require any technical expertise.

The rule does not affect local governments.

6. Minimizing adverse economic impact:

Since all of the regulated parties are assumed to be small businesses, the rule does not adversely impact small businesses relative to large businesses. Accordingly, differing reporting or compliance requirements for small businesses was not a practical option. In addition, the nature of the rule does not lend itself to the adoption of performance standards, and the rule, which follows a statutory mandate, does not allow for exceptions. Accordingly, although the Department considered the approaches suggested in State Administrative Procedure Act, Section 202-b(1), the Department did not adopt any of those approaches.

7. Small business and local government participation:

The Department of State solicited and received comment in the development of this rule from the New York State Association of Home Inspectors, which has members who work in rural areas.

Since the rule would not affect local governments, the Department did not solicit comment from local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:
This rule will apply equally to all home-inspector applicants in all areas of the State--urban, suburban and rural.
2. Reporting, recordkeeping and other compliance requirements:
(1) The reporting, recordkeeping and other compliance requirements are set forth fully in Section 6 of the Regulatory Impact Statement.
(2) Home-inspector applicants in rural areas will not need to employ any professional services in order to comply with this rule.
3. Costs:
The estimated compliance cost is set forth in Section 4 of the Regulatory Impact Statement. The Department of State does not anticipate that the estimated cost will vary significantly for different types of public or private entities in rural areas.
4. Minimizing adverse impact:
The Real Property Law, Section 444-k, requires that a licensed home inspector file with the Department of State proof of liability coverage, the terms and conditions of which shall be determined by the Secretary of State. Since a home inspector can inspect homes in any part of the State, the rule prescribes the same insurance requirement for all home inspectors. Further, Article 12-B does not provide the Department of State with authority to exempt home inspectors who live and work in rural areas.
5. Rural area participation:
Because the rule will apply in all areas of the State, the Department of State could not identify any practical way to notify interested parties in all of rural areas of the State. However, the Department of State worked closely in the development of this rule with New York State Association of Home Inspectors, many of whose members practice as home inspectors in rural areas of the State.

Job Impact Statement
This rule will not have any substantial adverse impact on jobs and employment opportunities. Section 444-k of the Real Property Law requires that an applicant for a home inspection license provide the Department of State with proof of having liability coverage, the terms and conditions of which shall be determined by the Secretary of State. If this rule were not adopted, prospective applicants could not comply with Section 444-k. Therefore, this rule will promote employment opportunities by ensuring that applicants can comply with Section 444-k and, thereby, qualify for a license as a home inspector.

**EMERGENCY
RULE MAKING**

Qualifying Courses for Home-Inspection Applicants

I.D. No. DOS-20-06-00008-E
Filing No. 530
Filing date: May 1, 2006
Effective date: May 1, 2006

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Subpart 197-2 to Title 19 NYCRR.
Statutory authority: Real Property Law, sections 444-c(6)(A) and 444-1
Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: This amendment was adopted on an emergency basis to preserve the public welfare by ensuring that schools and students will know what courses are required in order for an applicant to qualify for a home inspection license pursuant to Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law. Article 12-B provides, in part, that, on and after December 31, 2005, no person shall conduct a home inspection for compensation unless such person is licensed as a home inspector pursuant to Article 12-B. To qualify for a license, an applicant must successfully complete a course of study to be prescribed and approved by the Department of State. Accordingly, in order to ensure that prospective applicants can obtain the required courses and to ensure that schools are prepared to offer approved courses, this rule has been adopted on an emergency basis.

Subject: Qualifying courses for home-inspection applicants.
Purpose: To establish standards for home-inspection courses, as well as procedures for course approval.

Text of emergency rule: A new Subpart 197-2 of Part 197 of Title 19 of the NYCRR is adopted to read as follows:

Subpart 197-2

Home Inspection Qualifying Courses

§ 197-2.1 Approved entities.

Home Inspection courses and offerings may be given by any college or university accredited by the Commissioner of Education of the State of New York or by a regional accrediting agency accepted by said Commissioner of Education; public and private schools; and home inspection related professional societies and organizations.

§ 197-2.2 Request for approval of courses of study.

Applications for approval to conduct courses of study to satisfy the requirements for licensed home inspector shall be made at least 60 days before the proposed course is to be conducted. The application shall be prescribed by the Department to include the following:

- (a) name and business address of the proposed school which will present the course;
- (b) if applicant is a partnership, the names and home addresses of all the partners of the entity;
- (c) if applicant is a corporation, the names and home addresses of persons who own five percent or more of the stock of the entity;
- (d) the name, home and business address and telephone number of the education coordinator that will be responsible for administering the regulations contained in this part;
- (e) locations where classes will be conducted;
- (f) title of each course to be conducted;
- (g) detailed outline of each module, together with the time sequence of each segment;
- (h) final examination to be presented for each course, including the answer key;
- (i) all times included on each test form must be consistent with content specifications indicated for each course. Weighing of significant content areas should fall within the weight ranges indicated. All reference sources used to support each correct answer must be included. Linkage to each answer must be indicated with a footnote showing page number, subject matter, etc.;
- (j) description of materials that will be distributed;
- (k) the books that will be used for the outline and the final exams; and
- (l) a detailed description of the means of providing the 40 hour field based training.

§ 197-2.3 Subjects for study - home inspection.

The following are the required subjects to be included in the course of study in home inspection for licensure as a home inspector, and the required number of hours to be devoted to each such subject. All approved schools must follow this course syllabus in conducting their program.

Home Inspection Course Modules - 140 hours

Module 1
Structural
Exterior
Roof
25 hours

Final Exam
Module 2
Interior
Insulation and Ventilation
Electrical
25 hours

Final Exam
Module 3
Heating
Cooling
Plumbing
25 hours

Final Exam
Module 4
Overview of Profession
NYS License Law
Report Writing
25 hours

Final Exam
Module 5 40 hours

(1) 40 hours of unpaid field-based training in the presence of and under the direct supervision of a home inspector licensed by New York State, or a professional engineer or architect regulated by New York State

who oversees and takes full responsibility for the inspection and any report produced.

(2) Students have the option of not completing the field-based training by an approved school; however, all entities requesting approval for the Home Inspection qualifying curriculum must be approved for and make available to their students the 40 hours of unpaid field-based training and provide the Department of State with a detailed description of the means for providing the training.

(3) Schools must maintain a log of all inspections completed for purposes of providing proof of each student's field based training. The log must contain the following information:

- (a) the student's name;
- (b) the date of the home inspection;
- (c) the address of the property inspected;
- (d) the name of the client;
- (e) the amount of time that was spent on the inspection; and
- (f) the name, unique identification number and signature of the licensed home inspector, professional engineer or architect.

(4) Approved entities must verify hours of training and provide the student with a certificate of completion.

(5) If Field-based training is not completed by an Approved Home Inspection School, the student must maintain a log of all inspections completed for purposes of providing proof of their field based training. The log must contain the following information:

- (a) the date of the inspection;
- (b) the address of the property inspected;
- (c) the name of the client;
- (d) the amount of time that was spent on the inspection; and
- (e) the name, unique identification number and signature of the licensed home inspector, professional engineer or architect.

(6) Completed home inspections must be maintained by the licensed home inspector, professional engineer or architect, and are subject to review by the Department of State.

§ 197-2.4 Equivalency pre-licensing education courses completed prior to January 1, 2006.

(a) The criteria for approval of courses completed prior to the January 1, 2006, shall be that the course or courses have substantially covered the same subject matter, classroom hours of attendance and completed standards as prescribed by this Subpart as a prerequisite of licensing.

(b) Application for course evaluation must be accompanied by an official transcript or other documentation showing the subjects taken, the hours of instruction devoted to each subject and the hours attended by said applicant together with the date completed. In addition, a course description or outline must be provided by the school along with an applicant's equivalency request.

(c) The Department may request additional supportive documentation to determine course equivalency.

§ 197-2.5 Computation of instruction time.

To meet the minimum statutory requirement, attendance shall be computed on the basis of an hour equaling 50 minutes. For every 50 minutes of instruction there shall be an additional 10 minute break. The time of the breaks shall be left to the discretion of the individual education coordinator. Breaks shall not be considered optional, nor are they to be used to release the class earlier than scheduled.

§ 197-2.6 Attendance and examinations.

(a) No person shall receive credit for any course module presented in a class-room setting if he or she is absent from the class room, during any instructional period, for a period or periods totaling more than 10 percent of the time prescribed for the course module pursuant to section 197-2.3 of this Subpart, and no person shall be absent from the class room except for a reasonable and unavoidable cause.

(b) Students who fail to attend the required scheduled class hours may, at the discretion of the approved entity, make up the missed subject matter during subsequent classes presented by the approved entity.

(c) Final examinations may not be taken by any student who has not satisfied the attendance requirement.

(d) A make up examination may be presented to students at the discretion of the approved entity. Make up examinations must be submitted for approval to the Department in accordance with guidelines noted in section 197-2.2 of this Subpart.

(e) All examinations required for course work shall be written and given within a reasonable time after the course work has been conducted. The failure of the final exam shall constitute failure of the course module.

§ 197-2.7 Facilities.

Each course shall be presented in such premises and in such facilities as shall be necessary to properly present the course.

§ 197-2.8 Record retention.

All organizations conducting approved courses of study shall retain the attendance records, the final examinations and a list of students who successfully complete each course module for a period of three years after completion of each course module. All documents shall at all times during such period be available for inspection by duly authorized representatives of the Department of State.

§ 197-2.9 Faculty.

(a) Each instructor for an approved home inspection course of study must be approved by the Department of State. To be approved, an instructor must submit an application along with a resume reflecting three years of experience as a home inspector during which time the applicant has completed at least 250 home inspections.

(b) An instructor who does not qualify under subdivision (a) of this section may be approved as a technical expert if the instructor submits an application and resume establishing, to the satisfaction of the Department of State, that the applicant is an expert in and has at least three years' experience in a specific technical subject related to home inspection. Approval by the Department of State shall specify the subject(s) within the home inspection course or course module for which approval is given.

§ 197-2.10 Policies concerning course cancellation and tuition refund.

Any educational institution or other organization requesting from the Department of State approval for home inspection courses must have a policy relating to course cancellation and tuition refunds. Such policy must be provided in writing to prospective students prior to the acceptance of any fees.

§ 197-2.11 Revocation, suspension and denial of course approval.

The Department of State may deny, suspend, or revoke the approval or renewal of a home inspection course or a home inspection instructor, if it is determined that they are not in compliance with applicable law and rules, or if the offering does not adequately reflect and present current home inspection knowledge as a basis for a level of home inspection practice, or if the course provider or instructor has obtained, used or attempted to obtain or use the Department of State's home inspection examination questions. Prior to the denial of an application, suspension or revocation, the course provider or instructor shall have the opportunity to be heard by the Secretary of State or his designee.

§ 197-2.12 Advertisements.

Any education institution or other organization offering approved courses may not make or publish any false or misleading statement regarding employment opportunities which may be available as a result of the successful completions of a course or as a result of acquisition of a home inspector license.

§ 197-2.13 Auditing.

A duly authorized representative of the Department of State may audit any course offered, and may verify attendance and inspect the records of attendance of the course at any time during its presentation or thereafter.

§ 197-2.14 Open to public.

All courses approved pursuant to this Subpart shall be open to all members of the public regardless of the membership of the prospective student in any home inspection related professional society or organization.

§ 197-2.15 Certificates of completion and student lists.

(a) Evidence of successful completion of a course module must be furnished to students in certificate form. The certificate must indicate the following: name of the student; name of the course provider; title of the home inspection module; number of hours; code number of the module; a statement that the student, who shall be named, has satisfactorily completed a course of study in home inspection subjects or unpaid field-based training approved by the Secretary of State in accordance with the provisions of section 197-2.3 of this Subpart, and that his or her attendance record was satisfactory and in conformity with the law, and that such module was completed on a stated date. The certificate must be signed and dated with an original signature by the owner or course coordinator.

(b) A list of the names and addresses of students who successfully complete each course module must be submitted to the Department of State within 15 days of completion of a course module.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire July 29, 2006.

Text of emergency rule and any required statements and analyses may be obtained from: Whitney A. Clark, Department of State, 41 State St., Albany, NY 12231, (518) 474-6740, e-mail: WClark@dos.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law was enacted as Chapter 461 of the Laws of 2004 and subsequently amended by Chapter 225 of the Laws of 2005. Section 444-d of Article 12-B provides, in part, that on and after December 31, 2005, no person shall perform a home inspection for compensation unless such person is licensed as a home inspector. Section 444-e(b)(l) of Article 12-B provides that an applicant for a home inspection license must have successfully completed a course of study of not less than 140 hours approved by the Secretary of State. Section 444-c(6)(A) of Article 12-B authorizes the Secretary of State to adopt standards for home-inspection training, including standards for course approval. In addition, section 444-l, authorizes the Secretary of State to adopt such rules and regulations as shall be necessary to implement the home-inspection licensing program. This rule establishes standards for home-inspection training and procedures for course approval. Accordingly, the Secretary of State has express authority to adopt this rule.

2. Legislative objectives:

By enacting Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, the Legislature sought, in part, to ensure that home inspectors would be qualified by training and experience. As required by Article 12-B, this rule establishes standards for home-inspection training, as well as procedures for course approval. Accordingly, this rule advances the objectives that the Legislature sought to advance when it enacted Article 12-B.

3. Needs and benefits:

This rule is needed to ensure that schools can offer and that prospective license applicants can obtain the approved courses that will be needed to qualify for a home inspection license. Without this rule, courses cannot be approved. If no courses are approved, prospective applicants will be unable to qualify for home inspection licenses.

4. Costs:

a. Costs to regulated parties:

The Department of State solicited comments and costs from nine schools. Three schools responded with estimates of anticipated costs of complying with the rule. The following costs are based on those responses:

Estimated cost of preparing an application for course approval: \$750 to \$2,500.

Estimated cost per module for students: \$400 to \$600 per module.

Estimated cost of providing student with a certificate of completion: \$5 to \$10 per certificate.

Estimated cost of submitting names and addresses to the Department of State: \$10 to \$20 per student.

b. Costs to the Department of State:

The Department of State anticipates that the cost of implementation and continued administration of this rule will be minimal and that the Department's role in approving courses can be accomplished using existing staff and resources.

c. Cost to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The following sections of the rule have paperwork requirements:

§ 197-2.2 requires the submission of an application for approval of home inspection courses. Submission of an application is necessary if the Department of State is to evaluate and approve courses.

§ 197-2.3, Module 5(3), requires that an approved school maintain a log of all home inspections completed by each student as proof of the student's field-based training. The log is necessary for audit purposes and will be used as a means of providing proof that the student has completed his or her field-based training.

§ 197-2.3, Module 5(5), requires that a student maintain a log of all home inspections completed if the student's field-based training is not completed with an approved school. The log is necessary for audit purposes and will be used as a means of providing proof that the student has completed his or her field-based training.

§ 197-2.4 requires that an application for evaluation be filed if an applicant is claiming credit for unapproved courses that were taken prior to January 1, 2006. Submission of this application will provide an applicant with a means to obtain credit for a course taken prior to January 1, 2006, if

the course is equivalent to the course curriculum prescribed in § 197-2.3 of this rule.

§ 197-2.8 requires that an approved school shall retain attendance records, final examinations, and a list of students who successfully complete each course module for a period of three years. The rule is required for audit purposes and, this rule will benefit any student who may need a duplicate certificate of completion because he or she may have lost or misplaced the original certificate prior to filing their application with the Department of State.

§ 197-2.9 requires that each instructor file an application for approval before teaching an approved course. The rule is necessary to ensure that instructors are qualified by training and experience to teach the approved home-inspection courses.

§ 197-2.10 requires that an approved school shall, prior to accepting any fee from a student, provide to the student a written statement of the school's policy regarding cancellations and refunds. The rule is necessary to ensure that a student knows the school's cancellation and refund policy before paying any fee or tuition to a school.

§ 197-2.15(a) requires an approved school provide each student with a certificate of completion for each course module successfully completed by the student. The rule is necessary to ensure that students have proof of their having successfully completed an approved course.

§ 197-2.15(b) requires that an approved school submit to the Department of State a list of the names and addresses of the students who have successfully completed a course module and that such list be submitted within 15 days of completion of the course module. The rule is necessary for audit purposes.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state of federal requirement.

8. Alternatives:

The Department of State consulted with numerous individuals representing the home inspection industry, as well as industry teachers and building code officials. All parties were in general agreement that the proposed topics are standard topics for the industry. There was some interest in including certain environmental topics. However, in order to keep the required curriculum at 140 hours, it was decided not to include those topics, which can be offered at the desecration of the schools as addition, unmandated topics or as a continuing education offering.

9. Federal standards:

There are no federal standards for the training of prospective home inspectors. Accordingly, this rule does not exceed any existing federal standard.

10. Compliance schedule:

The Department of State anticipates that schools will be able to immediately comply with this rule. The schools that commented on the draft for this rule did not note any compliance difficulties.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will affect schools that offer approved courses for home inspectors. The Department of State is aware of nine schools that may offer approved courses. The Department anticipates that other schools may decide to offer such courses. The Department believes that all of these schools can be classified as small businesses for the purpose of this analysis.

The rule will also affect persons wishing to become licensed as home inspectors. The Department of State is able to predict how many persons intend to become licensed as home inspectors. The Department believes that all such persons can be classified as small businesses for the purpose of this analysis.

The rule does not apply to local governments.

2. Compliance requirements:

The reporting and record-keeping requirements for are detailed in section 6 of the Regulatory Impact Statement. Those requirements will affect the small businesses identified in section 1 of this Analysis.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Small businesses will not need professional services in order to comply with this rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

Estimates of the costs of compliance are detailed in section 4 of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

The estimated costs of compliance, as set forth in section 6 of the Regulatory Impact Statement, suggest that it will be economically feasible for small businesses to comply with the rule. The rule does not require any technical expertise in order to comply with the rule.

The rule does not affect local governments.

6. Minimizing adverse economic impact:

Since all of the regulated parties are small businesses, the rule does not adversely impact small businesses relative to large businesses. Accordingly, differing reporting or compliance requirements were not a practical option. The nature of the rule does not lend itself to the adoption of performance standards, and the rule, which follows a statutory mandate, does not allow for exceptions. Accordingly, although the Department considered the approaches suggested in State Administrative Procedure Act, § 202-b(1), the Department did not adopt any of those approaches.

7. Small business and local government participation:

The Department of State solicited and received comment from schools that are likely to offer home-inspection courses, as well as comment from the New York State Association of Home Inspectors.

Since the rule would not affect local governments, the Department did not solicit comment from local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

(a) This rule will apply equally to all home-inspector applicants and all home-inspector schools in all areas of the State--urban, suburban and rural.

2. Reporting, recordkeeping and other compliance requirements and professional services:

(b) (1) The reporting, recordkeeping and other compliance requirements are set forth fully in Section 6 of the Regulatory Impact Statement.

(2) Home-inspector applicants and home-inspector schools in rural areas will not need to employ any professional services in order to comply with this rule.

3. Costs:

(c) The compliance costs are set forth in Section 4 of the Regulatory Impact Statement. The Department of State does not anticipate that those estimated costs will vary significantly for different types of public or private entities in rural areas.

4. Minimizing adverse impact:

(d) Article 12-B (Home Inspection Professional Licensing) of the Real Property Law seeks to establish minimum qualifications for home inspectors throughout the State. In doing so, Article 12-B prescribes that an applicant must complete a course of study consisting of at least 140 hours of study approved by the Secretary of State. In developing this rule, the Department of State did not identify any areas of study that were unique to home inspectors in rural areas. Accordingly, the rule prescribes a course of study that will be required of all prospective applicants, including those in rural areas. In addition, Article 12-B does not provide the Department of State with authority to exempt applicants who live in rural areas of the State.

5. Rural area participation:

(e) Because the rule will apply in all areas of the State, the Department of State could not identify any practical way to notify interested parties in rural areas of the State. However, the Department of State worked closely with New York State Association of Home Inspectors, many of whose members practice as home inspectors in rural areas of the State to develop this rule.

Job Impact Statement

This rule will not have any substantial adverse impact on jobs and employment opportunities. Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law requires that an applicant for a home inspection license provide proof of having completed a course of study of at least 140 hours approved by the Secretary of State. If this rule was not adopted, home-inspector schools would not be able to offer approved courses and, accordingly, students would be unable to obtain the required 140 hours of study required of an applicant for a home inspector's license. Therefore, this rule will promote employment opportunities for those who will teach the courses and for those students who aspire to become licensed home inspectors.